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IN THE

Supreme Court of the United States

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October Term, 1971

No. 69-5030

On Writ of Certiorari to the Supreme Court of Georgia.

LUCIOUS JACKSON,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

No. 69-5003

On Writ of Certiorari to the Supreme Court of Georgia.

WILLIAM HENRY FURMAN,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

No. 68-5027

On Writ of Certiorari to the Supreme Court of California.

EARNEST JAMES AIKENS, JR.,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

No. 69-5031

On Writ of Certiorari to the Court of Criminal Appeals of Texas.

ELMER BRANCH,

Petitioner,

vs.

STATE OF TEXAS,

Respondent.

Motion for Leave to File Brief Amici Curiae on Behalf of James V. Bennett, Clinton T. Duffy, Robert G. Sarver, Harry C. Tinsley and Lawrence E. Wilson (No. 69-5030, 69-5003, 69-5031) and Brief Amici Curiae.

HILBERT P. ZARKY,
MARC I. HAYUTIN,
1800 Century Park East,
Los Angeles, Calif. 90067,
Attorneys for Amici Curiae.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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James V. Bennett, Clinton T. Duffy, Robert G. Sarver, Harry C. Tinsley and Lawrence E. Wilson respectfully move for leave to file a brief *amici curiae* in these cases. The attorneys for each of the petitioners in these cases have consented to the filing of this brief. The Attorney General of the State of California has consented to the filing of this brief in *Aikens v. California,* No. 68-5027. The Assistant Attorney General of Texas has stated that it is not the policy of the Attorney

General's Office of Texas to consent to the filing of *amicus* briefs and has, consequently, failed to give the requested for consent in *Branch v. Texas*, No. 69-5031. The Assistant Attorney General of the State of Georgia, while stating that that office has no objection to our filing of an *amicus* brief, has not granted any express consent in the cases of *Jackson v. Georgia*, No. 69-5030, and *Furman v. Georgia*, No. 69-5003.

In view of the overwhelming importance of the question which this Court will be required to pass on, *amici curiae* believe that this Court should have before it the expression of their views since each has had intensive personal experience, in an official capacity, with respect to operation of our penal system and the infliction of the death penalty.

James V. Bennett is an attorney. He was formerly Director of the Federal Bureau of Prisons, and presently serves as a consultant to the Bureau. He is a past Chairman of the Criminal Law Section of the American Bar Association.

Clinton T. Duffy is a former Warden of San Quentin Prison, and also a former member of the California Adult Authority, and is a member of the Wardens Association of America.

Robert G. Sarver is an attorney. He has served as Commissioner of Corrections for the States of West Virginia and Arkansas.

Harry C. Tinsley served as Commissioner of Corrections for the State of Colorado until May, 1971. He is a former Warden of Colorado State Prison, and is a member of the Wardens Association of America and of the American Correctional Association. He has served as president of both organizations.

Lawrence E. Wilson is a former Warden of San Quentin Prison.

Amici have written numerous books and articles on criminal law and corrections, and on capital punishment in particular, have testified before legislative committees concerned with the death penalty, and have spoken extensively on the subject. *Amici* have witnessed hundreds of executions in the United States. Through years of first hand experience with the death penalty, its applications, its victims and its impact on the administration of justice and the correctional systems in our society, they have become confirmed opponents of capital punishment. (In this regard it should be noted that *amici* differ in the extent of their opposition to the death penalty in that Mr. Bennett might permit retention of capital punishment for the most heinous crimes, which he has suggested might include assassination of the President, treason and mass murder, such as by bombing an airplane.) *Amici* Duffy, Sarver, Tinsley and Wilson would abolish the death penalty entirely. *Amici* are nevertheless of one mind as to the abolition of the death penalty in almost all cases, including those now before the Court.

We believe that the proposed accompanying brief will be of assistance to the Court, and for the reasons stated above, we respectfully request leave to file the annexed brief *amici curiae*.

Respectfully submitted,

HILBERT P. ZARKY,
MARC I. HAYUTIN,
Attorneys for Movants.

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Opinions Below.

The opinion of the Supreme Court of Georgia (*Jackson v. Georgia,* No. 69-5030) holding that the imposition of the death penalty was not in violation of the Eighth and Fourteenth Amendments of the Constitu-

tion of the United States prohibiting cruel and unusual punishment is reported at 225 Ga. 790.

The opinion of the Supreme Court of Georgia (*Furman v. Georgia*, No. 69-5003) holding that the imposition of the death penalty was not in violation of the Eighth and Fourteenth Amendments of the Constitution of the United States prohibiting cruel and unusual punishment is reported at 225 Ga. 253.

The opinion of the Supreme Court of California (*Aikens v. California*, No. 68-5027) holding that the imposition of the death penalty was not in violation of the Eighth and Fourteenth Amendments of the Constitution of the United States prohibiting cruel and unusual punishment is reported at 70 Cal. 2d 369.

The opinion of the Court of Criminal Appeals of Texas (*Branch v. Texas*, No. 69-5031) holding that the imposition of the death penalty was not in violation of the Eighth and Fourteenth Amendments of the Constitution of the United States prohibiting cruel and unusual punishment is not yet officially reported. Its opinion is reported in 447 S.W.2d 932.

Jurisdiction.

Petitions for writs of certiorari in each of the cases were granted on June 28, 1971, limited in each case to the following question, "Does the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?" Jurisdiction of this Court in all cases is founded on 28 U.S.C. 1257(3).

Interest of Amici Curiae.

The interest of *amici curiae* has been set forth in the accompanying motion to file this brief and need not be reiterated here.

ARGUMENT.

The Infliction of the Death Penalty in Each of the Pending Cases Would Constitute Cruel and Unusual Punishment in Violation of the Eighth and Fourteenth Amendments.

From their personal experiences in the prison system, *amici* have concluded that the infliction of the death penalty does not serve any proven, legitimate purpose which society may have in imposing punishment for the commission of most capital offenses. While *amicus* James V. Bennett, as noted in the accompanying motion, believes that capital punishment may be appropriate in certain unusual situations, all *amici* are firmly convinced that in cases involving rape or murder, such as are involved here, the death penalty cannot be justified as legitimate punishment.

A. The Death Penalty Is Arbitrarily and Capriciously Imposed.

Amici have dealth with thousands of men and some women condemned to death and with thousands of other men and women convicted of similar crimes (in many instances convicted of more heinous crimes than those who have been condemned to die for their acts) but who have received jail sentences. Of course, the facts in each case are different. Nevertheless, any warden of a large prison, and certainly *amici* collectively, have vastly more experience with persons convicted of capital offenses than any jury, prosecutor or trial judge. *Amici* respectfully submit that they are therefore capable of generalizing about the crimes committed by these thousands of persons. What is it that distinguishes those who have been condemned to die from those who are permitted to live? What is it that distinguishes a man who, after having exhausted all ap-

peals must die at the hands of the State, from the man who is given a chance to demonstrate his rehabilitation after serving what is generally a 13 to 16 year term of imprisonment, and who may thereafter become a constructive member of society (though many lifers die in prison after serving 20, 30, or even 40 years)?

Bluntly, the distinguishing characteristics are poverty, ignorance, and out of all statistical proportion, race. This overwhelming fact is recognized not just by prison and probation officials and clerics who administer last rites to the condemned men, but by the prisoners themselves, whether condemned or not. Whatever may have gone into a judge's or jury's decision to visit death rather than life upon a convicted man, insofar as the prison community is concerned, the arbitrariness with which the death penalty is imposed makes a mockery of the supposedly rehabilitative system, and makes incalculably more difficult the arduous task of rehabilitating those who have by their crimes demonstrated a lack of understanding of our concepts of justice and law.

B. The Death Penalty Does Not Deter.

Amici, and Mr. Duffy in particular, have made extensive personal efforts during the tenures of their offices as wardens to determine what impact, if any, the death penalty has had on convicted criminals. Warden Duffy has interviewed hundreds of convicted men and women, both those who have been condemned to die and those who have been allowed to live. He has discussed the issue with prisoners who might have been condemned to death by the nature of their crimes, and prisoners whose crimes did not admit of the death penalty. As Warden Duffy testified in 1968 in an ap-

pearance before the sub-committee of the State Judiciary Committee, the invariable answer to his questions, given when the prisoner has already been convicted and need not curry favor with jailer or prosecutor, is that the existence of the death penalty had absolutely no impact on the perpetrators of the various crimes, whether the crime involved was burglary, robbery, rape, kidnapping or premeditated murder. Rather, invariably, the criminal has acted either out of passion or with the unalterable belief that he will not be caught.

Amici wish to go on record as emphatically disavowing any argument that the existence of the death penalty protects the administration of our prison system. In their opinion, any such argument is wholly fallacious, and the only impact of the death penalty in the prison community, except for those who are executed, is a terribly deleterious impact on prison morale—on both sides of the cell. On the contrary, *amici* are personally aware of instances of homicides within prison walls and even homicides by persons who have been involved in an official capacity with the administration of the death penalty, including in the case of Warden Duffy, a deputy sheriff who used to bring prisoners to San Quentin regularly and another man who helped install a lethal gas chamber at San Quentin and later killed three people. He was sentenced to death and died in San Quentin's gas chamber. Interviews with such persons again produced the invariable response that the death penalty was the farthest thing from their minds when they committed their crimes.

Amici think it ironic indeed that the only argument in favor of the death penalty which has some claim to legitimacy, that of deterrence, is mocked by the very method of death. If it be thought that the spectacle de-

scribed below would have a deterrent impact at least on those who must witness the awful sight, then why are executions conducted with only a very few witnesses present and the procedures kept as secret as possible? This is a far cry from public executions in 17th and 18th century England. The reasons for secrecy, *amici* submit, are clear. As is well known, homicides and other serious crimes increased after public executions in England, and *amici* believe that even secret executions in the United States promote more serious crimes in the community, rather than deter them. In addition, those who have imposed this secrecy have done so not out of regard for the man who must die, but in recognition that an execution is a demoralizing spectacle that degrades any person who participates in it. *Amici* believe that if executions were held in public in America today, the public would insist on abolition of the death penalty.

C. The Death Penalty Is a Tremendous Human Waste.

On the basis of their long years of professional experience, *amici* believe that most prisoners can be changed for the better, whatever the faults of our existing prison system. It is also statistically verifiable and comports with the personal experience of *amici* that persons convicted of capital offenses who are not executed, generally make very good prisoners. Not all of them are on parole. Warden Duffy alone saw 80 men die of natural death in prison, some of whom had served sentences of 30 to 40 years in the ten year period which he surveyed with complete statistics. However, those who are paroled are, in the opinion of almost all persons in any way involved in the administration of our parole system, by far the best parolees.

It is an extreme rarity that a man who has been convicted of a capital offense and paroled is ever convicted of another serious offense and returned to prison. To deny a chance at parole, especially in the arbitrary and capricious manner in which the denial is now made is to sacrifice society's legitimate interest in rehabilitation in favor of the base desires of some for retribution and vengeance.

D. The Imposition of the Death Penalty Admits of No Errors.

There have been errors. Whatever the procedural safeguards which may be imposed by this Court and by various legislatures, no system can be wholly free from error and an innocent person once put to death cannot be returned to life. More frequently there are the last minute commutation or pardons. *Amicus* Bennett has written graphically of his own experience involving emergency telephone calls that cannot be completed and break-neck automobile rides in an attempt to convey a message of presidential pardon before the executioner administered the final penalty.

E. The Death Penalty Hampers Effective Administration of Our Prison System.

Amici respectfully submit that the existence of capital punishment dehumanizes our system of prison administration to such a degree that it is increasingly difficult to obtain humane and enlightened administrators. *Amici* have personally known of numerous instances of persons who are unwilling to become involved in administering the death penalty who are very competent administrators and who are very concerned with the administration of our prison system. *Amici* have also known of instances of competent administrators resigning after the occurrence of a particularly grue-

some experience, and *amicus* Sarver stated publicly during his tenure in office that he would not permit an execution to take place so long as he was in charge of the correctional system.

F. The Death Penalty Is Barbaric.

Since very few persons have witnessed an execution, very few can realize the details, which we can only describe as barbaric, which are involved in the preparation for and the carrying out of the death penalty. A brief description of the methods of legalizing killing now employed by various jurisdictions in the United States seems appropriate.

The day before being executed, the prisoner condemned to death by hanging goes through the harrowing experience of being weighed and measured for neck size and length of drop, to assure that his neck will break when he is hanged. The hanging itself, whether the prisoner is dropped through a trap, after climbing the traditional 13 steps, or whether he is jerked from the floor after having been strapped, blackcapped and noosed, is a very gruesome spectacle. Generally, three men in a small enclosure on the gallows cut taut strings; one of these springs the trap, while the other two are attached to dummy ropes. This somewhat bizarre procedure is designed to give the three officers some feeling of non-responsibility for the death of their victim. The prison guard stands at the feet of the hanged person and holds his body steady, because during the first few minutes there is usually considerable struggling by the condemned man as he tries to breathe. Sometimes his neck does not break and he strangles to death. His eyes pop almost out of his head, his tongue swells and protrudes from his mouth, his neck

may be broken and the rope may rip large portions of his skin and flesh from the side of his face on which the noose is set. He urinates, he defecates, and his droppings fall to the floor while witnesses look on. In almost all executions at least one witness faints or has to be helped out of the witness room. The prisoner remains dangling from the end of the rope from 8 to 14 minutes before the attending doctor climbs up a small ladder and listens to his heartbeat with a stethoscope and pronounces him dead.

In States which practice electrocution, the body of the condemned man is prepared beforehand with a fastening, and one of his pants legs is split in order that an electric plate can be placed against his leg. When the executioner throws the switch that propels the electric current through the body of the prisoner, the victim cringes from torture, his flesh swells and his skin stretches to a point of breaking. He defecates, he urinates, his tongue swells and his eyes pop out. In some cases his eyeballs rest on his cheeks; his flesh is burned and smells of cooked meat; sometimes a spiral of smoke rises from his head.

When a firing squad is the method of death, several rifle shots are fired, all but one of which is effective. As in the case of hanging and electrocution, shooting disfigures the body of the prisoner.

In administering death by lethal gas, the State keeps the prisoner in a holding cell in a separate room for his last few days, usually not more than 20 feet from the lethal gas chamber. He is dressed in blue jeans and a white shirt as other garments might hold a pocket of gas. He is accompanied 10 or 12 steps to the gas chamber by two officers, quickly strapped in a metal

chair, a stethoscope applied and the door sealed. Out of sight of the witnesses the executioner, on a signal from the warden, presses the lever which allows the cyanide gas eggs to mix with the distilled water and sulphuric acid. At first there is extreme evidence of horror, pain and strangling. The prisoner's eyes pop, they turn purple, they drool. Soon the prisoner is unconscious. It is a horrible sight, at which witnesses frequently faint.

Whatever the means of death, the execution of a human being is a degrading spectacle which few can stomach. It is carried out in secret. The victim has paid his "debt to society" by suffering the ultimate punishment; but the State is not the richer.

Conclusion.

The death penalty itself is cruel and barbarous, imposed on the uneducated, the poor and the black and brown. Its existence distorts our whole system of criminal justice, brings distrust upon our courts, creates suspicion of the adversary system and makes the administration of our correctional system shunned by constructive and humane individuals who will not be involved in executing a death sentence. Almost all of western society save the United States has abolished the death penalty and the trend has become worldwide, except for such politically torn countries as Iraq and some of the African nations. *Amici* respectfully submit that the death penalty has no place in the administration of justice in the United States.

For each of the reasons discussed above, the death sentence imposed upon petitioners in the cases before the Court should be invalidated.

Respectfully submitted,

HILBERT P. ZARKY,
MARC I. HAYUTIN,
Attorneys for Amici Curiae.

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BRIEF AMICI CURIAE OF THE WEST VIRGINIA COUNCIL OF CHURCHES, CHRISTIAN CHURCH (DISCIPLES) IN WEST VIRGINIA, and UNITED METHODIST CHURCH, WEST VIRGINIA CONFERENCE

PAUL RAYMOND STONE,
Attorney for Amici
1901 Huber Road
Charleston, W.Va.

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BRIEF AMICI CURIAE OF THE WEST VIRGINIA COUNCIL OF CHURCHES, CHRISTIAN CHURCH (DISCIPLES) IN WEST VIRGINIA, and UNITED METHODIST CHURCH, WEST VIRGINIA CONFERENCE

Statement of the Interest of Amici

The West Virginia Council of Churches is an organization whose affiliate members represent all the major Protestant denominations in the State, participating with the Roman Catholic Archdiocese of Wheeling; its Division of Life and Work is its arm in the Council's concern with major moral and social issues of our time. The West Virginia Council of Churches is on record with a strong stand against the imposition of capital punishment.

The Christian Action and Community Service Department (of which counsel for the amici is a member) of the Christian Church (Disciples) in West Virginia, is the Church's action arm in its stand on moral issues in the secular world; the Disciples of Christ is the first major Protestant denomination having its origins in the United States. The World Convention of the Disciples of Christ has resolved strongly against capital punishment, as being morally defenseless.

The United Methodist Church has had a long history of involvement in helping solve America's problems; its Board of Social Concerns of the West Virginia Annual Conference represents it in the stand taken herein--which reflects the opposition, both state and national--of Methodists against the death penalty.

Consent of all parties has been secured for the submission of this *amici curiae* brief (letters thereof are filed with the Clerk of the Court).

ARGUMENT

I.

CAPITAL PUNISHMENT IS CRUEL AND UNUSUAL PUNISHMENT IN THE SENSE, AMONG OTHER THINGS, THAT ITS IMPOSITION INFRINGES THE PRISONERS' RELIGIOUS FREEDOM UNDER THE FIRST AMENDMENT IN A MANNER WHICH CONSTITUTES MENTAL CRUELTY

The First Amendment to the United States Constitution, in addition to providing for freedom of speech, is the source of our precious heritage of religious freedom (including the right to be free from unnecessary prohibitions on the exercise of our religion);

> *Congress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof. (emphasis supplied)*

It is so well-settled, as not to require citation, that the foregoing is also a restraint on state action (as is the cruel and unusual punishment proviso, by operation of the Fourteenth Amendment[1]).

It is conceded that there are limits on the right to exercise one's religious beliefs[2], but these limitations have heretofore

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[1] *Robinson v. California*, 370 U.S. 660 (1962)

[2] *Sharp v. Sigler*, 408 F.2d 966(8th Cir.1969); *Journal of Criminal Law, Criminology, and Police Science* 60:299 (Sept.1969). Cf. *Glenn v.Wilkinson*,309 F.Supp.411,417,418 (DC,Mo. 1970),but even in this case, it is noted,

been judicially applied--and, we submit, should continue to be applied--only to situations where the practice or the exercise of the claimed religious right in some way interferes with a "compelling state interest"[3] (e.g., the safety or welfare of others, including considerations of prison discipline, etc.).

We respectfully submit that there cannot be a sufficiently-overriding state interest in perpetuating the death penalty when due regard is also taken of the right of a prisoner to the free exercise of his religion involved in his efforts--while incarcerated --to seek his own spiritual salvation(or conversion experience), which is taught as fundamental by all of the major Protestant denominations, as well as in the Roman Catholic and other faiths. The "snuffing out" of the prisoner's life will deprive him of all further earthly opportunity to strive toward such salvation, even though knowledge of its attainment--prior to death--may not be the subject of absolute certainty (even St.Paul expressed a fear of being found "wanting", in the final analysis, based on his own scriptural assertions).

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access to Catholic clergy and rites,which were theretofore not provided, were ordered by the court for the prisoner(who was on death row).

[3] *Sherbert v. Verner,* 374 U.S. 398,406(1963) *NAACP v. Button,* 371 U.S. 415,438(1963); *West Virginia State Board of Education v. Barnett* 319 U.S. 624,644 (1943).

The state, in its provision for prison chaplains and allowance of devotionals,etc., has recognized some sort of obligation in respect to the spiritual needs of its death row inmates by providing a limited amount of help to a prisoner in his efforts toward an exercise of his religious beliefs; however, viewed in a critical light and with discerning judgment, this activity on the part of the state is quite superficial and perfunctory when compared with the actual spiritual needs of most of its death row inmates. There is no substitute for the element of time (i.e., the right of the prisoner to be free from the premature ending of his life at the hands of the state, which also ends all his temporal efforts of continued striving toward spiritual progress in ultimately finding God); the killing in the execution chamber of unredeemed men represents one of the major evils inherent in capital punishment, and makes a mockery and travesty of our protestations--under the aegis of our major Faiths--of the redemptive capacity of man (indeed, it is utterly inconsistent with one of our basic Christian tenets that any man is potentially salvageable....with the possible exception of those who have committed the so-called "unpardonable sin" of blasphemy against the Holy Ghost which is not a capital offense under the laws of any of our states!)

It is noted that the wisdom or logic underlying a particular religion--the free exercise of which is sought--is not a proper matter for the courts to impugn, absent any infringement on health or safety as a result thereof[4].

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[4] *U.S. v. Ballard*, 322 U.S. 78 (1944); see *Founding Church of Scientology v. U.S.*, 409 F.2d 1146 (D.C.Cir.1969).

A belief may be "incredible, if not prepos
terous"[5] . . . in respect to a claimed religi
freedom.

It matters not whether the acquisition
of salvation, or conversion, while still o
earth and alive is sound doctrine--theolog
cally speaking--or whether the truth is th
we may all be given a "second chance" by a
beneficent God in the hereafter; it would
considerably more spiritually palatable (a
conducive to tranquility, rather than the
herently cruel state of mental anguish now
suffered by death row inmates) were this
beneficence to take the form of a favorabl
ruling by the U.S.Supreme Court. A favorab
ruling would certainly be in consonance wi
the Eighth and Fourteenth Amendments (as a
result of relief of the mental and spiritu
cruelty due to the adverse psychological
pressures involved in the formidable,perma
deprivation--through the execution of deat
of the First Amendment right to a continue
opportunity to exercise religious efforts
toward salvation). We submit that the word
"free" in the First Amendment--while not
implying a right to be free from incarcera
--clearly imports a right to seek one's sa
tion free from any impending urgency and
inhibition of one's religious thought proc
as a result of the specter of the electric
chair or gas chamber. Not only is the oppr
sive (indeed,panicky) environment generate
these implements of execution--and their
portent for ending the prisoner's life--
unconducive to the prisoner's effective ef
toward spiritual salvation, but the awesom

[5] *U.S.v.Ballard,supra,* at page 87.

imminent act of the executioner, as well, creates an almost insurmountable barrier to the necessary positive state of mind (i.e., thoughts of love, charity, benevolence,and graciousness, etc., rather than of hatred and malice, as naturally directed against society and particularly toward the state and its executioner by the prisoner when contemplating his imminent untimely doom).[6]

It should be especially noted that mental cruelty is within the ambit of the cruel and unusual punishment concept. In *Trop v. Dulles*, 356 U.S. 86, the United States Supreme Court held in 1958 that psychological distress is covered by such concept, in holding a sentence of expatriation to be violative of such constitutional principle.

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[6] *Chronicles of San Quentin--The Biography of a Prison*, Kenneth Lamott, 1961 (McKay Publishing Co.), p.231, contains a description of the effect which his impending execution was having on a Negro man named Robert O. Pierce: " * * * he got a mirror fragment and cut his throat as he kneeled to receive the Protestant chaplain's last benediction * * * As he was dragged into the death chamber, he said 'I'm innocent, God, you know I'm innocent. Please,Lord, I am.' After a moment, 'All right, God, if you want to let me go, I won't curse you.' The blood from the gash in his neck was spreading over his white shirt as he was forcibly strapped into the chair. As the door was locked, the witnesses heard him scream, 'God, you son of a bitch, don't let me go like this!"

The cruel and unusual punishment proviso of the Eighth Amendment is a fluid, dynamic concept that is responsive to changing times and conditions, and is not a static, fixed concept that means no more than that originally ascribed to it. The U.S. Supreme Court has acknowledged this important fact on more than one occasion; in commenting upon the elasticity of the cruel and unusual punishment concept, the Court stated that it "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[7]

The Supreme Court, in *Weems v. U.S.*, 217 U.S. 349,378, a case involving the cruel and unusual punishment concept, stated as far back as the year 1910 that constitutional protection expands "as public opinion becomes enlightened by a humane justice." The Court in the cases at Bar is simply being asked to scrutinize capital punishment in all of its aspects of cruelty--in the light of modern knowledge and understanding concerning the circumstances and application of the death penalty--and, under our presently evolved standards of decency, to vitiate this inherently cruel, and increasingly unusual, punishment in favor of the at least equally effective deterrent, life imprisonment.

Indeed, the concepts previously discussed, as well as those hereinafter noted (not to foreclose others which the Court *sua sponte* may realistically envisage) will more than serve to counterbalance any claimed "compelling interest" on the part of the state.

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[7] *Trop v. Dulles, supra,* at pages 100,101.

The "compelling interest" on the part of the state which needs to be shown in justification of the deprivation of a basic constitutional right was the subject of the Supreme Court's decision in *Sherbert v. Verner, supra*, and a long line of cases --both before and after *Sherbert*--which not only involved basic religious freedom,but other constitutional rights,as well.

Mental cruelty having been shown to be within the scope of the basic constitutional right to be free from the infliction of "cruel and unusual punishment" in the Eighth Amendment (operative on the states through the Fourteenth Amendment), the question is posed: What could be more cruel than depriving prisoners--most of whom are oriented in the prevailing tradition of spiritual salvation attainable only before death--of the opportunity to realize the most important goal of all? It matters not, from a legal standpoint, whether such goal is attainable in an individual case--were the prisoner to live out the balance of his natural life, unfettered by the hand of the executioner-- or, for that matter, whether such goal is still attainable after death (as some believe to be a possibility), the crucial fact is that it constitutes mental cruelty of the worst sort to deprive a prisoner (by the premature ending of his life by the state) of the tranquility inherent in the knowledge that his available time--in which he can continue to seek his Deity, within the framework of his own religious heritage--is not going to be cut short!

Although the Scriptures note that "the wages of sin is death" (meaning death of the soul, of course, as all must die a physical death), it is possible for some to be expiated in the "twinkling of an eye" (as was the thief on the Cross, St. Dismas, who was told by Jesus, "Truly,I say to you, today you will be with me in Paradise"[8]). It is respectfully submitted that it is not asking too much of the Court to assume that countless death row inmates will not be so fortunate in so short a time (as was the case of the prisoner on the third cross!)

It may be argued, in the case of atheistic or agnostic death row inmates, that equal protection concepts would preclude the Court's acceptance of this religious cruelty facet of Eighth (and Fourteenth) Amendment concepts, on the ground of preferential treatment; however, the cruel and unusual punishment proviso must be weighed in terms of its actual effect on a substantial number of death row inmates (if found to constitute cruel and unusual punishment in such case, equal protection under the Fourteenth Amendment would dictate according irreligious condemned men the right to life also....certainly the latter need the benefit of a continued right to life as much as anyone if our own basic religious heritage in this country--which so strongly emphasizes salvageability--is to be given any meaning at all!)

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8 *New Testament (Revised Standard Version)*, Luke 23:43

II.

OTHER BASES OF MENTAL CRUELTY RESULTING FROM THE DEATH PENALTY

There are many other reasons whereby, under the circumstances obtaining in these cases, the imposition of the death penalty is causative of mental anguish--and, hence, mental cruelty. As noted hereinbefore, mental cruelty is substantially within the ambit of the cruel and unusual punishment prohibition. See *Trop v. Dulles*, *supra*, at pages 101, 102.

Capital punishment has a particularly invidious nature, because it is unfair and unjust in its imposition and application. It generates highly aggravated feelings of mental anguish (hence, mental cruelty) on the part of condemned men who, for the most part, are from less-favored ethnic and socio-economic groups in our country (the condemned men in these cases at Bar are each Negro; they are all poor, as witnessed by this Court's permission for them to proceed in *forma pauperis*).

For the condemned prisoner who knows that he is the subject of invidious discrimination as a member of a disfavored ethnic or socio-economic group whose members (as the prisoners herein) receive a disproportionately large share of death sentences, compared to the general population, capital punishment is thus also promotive of a special kind of mental suffering (far over and above that generated by fear of execution alone in those decidedly few condemned persons of relatively higher social strata)!

Also promotive of mental anguish is the prisoner's realization that his death is really useless, and accomplishes nothing, as a deterrent to serious crime[9]. A careful survey of the FBI *Uniform Crime Reports*, for the years 1959 through 1969 (1970 figures were not available at the time this brief was prepared, such figures being released in mid-August of the year following the reported year) most decidedly shows that capital punishment is no deterrent to capital crime. These significant statistics show that the State of Georgia (in which the prisoners Furman and Jackson were given the death sentence) has had a markedly higher murder and non-negligent homicide rate than that of an abolition State, Wisconsin, the latter State having similar population (as well as population density) characteristics--the latter factor being the presently-recognized factor in causality having the most important significance to the incidence of serious crime. Perhaps of even greater significance is a comparison of the rates of serious crime of the two largest cities in these respective States (Atlanta visavis Milwaukee) which are quite revealing in showing a virtually overwhelming difference in the murder and non-negligent homicide rates (Atlanta,with a population similar to that of Milwaukee, having a markedly higher rate!) The same phenomenon is again noted when comparing South Dakota (having capital punishment) with its near perfect counterpart, North Dakota (which does not have capital punishment)! The Court should take judicial notic

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9 *Crime in the United States* (FBI Uniform Crime Reports), 1959-1969

of all the factors relevant to capital punishment, including the best available statistics (which show clearly that the death penalty does not deter capital crime), as former Justice Arthur Goldberg urged[10]. The Court, in viewing such statistics, may be tempted to conclude that capital punishment is an inducement to the commission of capital crime in many instances. Actually, when one carefully compares the best available data, as between abolition and non-abolition states having similar characteristics (population density,etc.), one finds many more instances of lower serious crime rates in abolition states--in cases where there is any appreciable difference at all.

Former Justice Goldberg, as noted, indicated a duty of the Court to consider all available data in respect to the indication that capital punishment is disproportionately and, hence, an excessively severe punishment in relation to its ostensible social effect (i.e., its assumed deterrence, etc.)

Bedau, in his notable work, *The Death Penalty in America* (1968), which includes Professor Thorsten Sellin's findings, as well as those of other experts in this field, notes that capital punishment has been so found; the basis of the best available evidence (and we should decidedly use what we have, even though it does not attain the degree of precision necessary to a chemical equation) clearly shows that capital punishment is no deterrent to capital crime[11].

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[10] *Harvard Law Review*, 83:1773 (June 1970).

[11] In Bedau's work, page 284, Dr. Sellin states: "Anyone who carefully examines the * data is

The inmates of death row--at least through the "jailhouse lawyers"--are well aware of the fact that capital punishment does not deter capital crime which, it is respectfully submitted, is more than a considerable source of additional mental anguish for death row inmates.

It is not at all comforting, either, to note that Roper's opinion polls--in showing a myriad of up and down changes in public sentiment about capital punishment--showed that a majority of Americans was opposed to the death penalty on February 9, 1958 . In the latter connection, it is also noteworthy that a large majority of this world's civilized governments--other than Communist countries and dictatorships-- have abolished capital punishment!

It is also substantially promotive of mental anguish--hence, mental cruelty--for the condemned prisoner who knows that his death will extinguish all legal rights, including all future rights flowing from evolved concepts of due process[12], when the condemned man compares his own situation with that of a fellow-prisoner who is under a life sentence for the same type of crime (the latter person maintains a continued right to release if facts showing innocence are uncovered, or at least a right to a new trial in the event of future changes in legal concepts applicable to his case (for example, in respect to the changing law as to invalidity of con-

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bound to arrive at the conclusion that the death penalty,as we use it,exercises no influence on the extent ***of capital crimes.

12 Due process rights follow the prisoner

victions because of changing legal concepts as to whether a confession--strenuously objected to at trial, but admitted anyway--was really involuntary).

It is also a source of considerable mental anguish to the condemned man, in comparison to the situation where life imprisonment is the sentence, because of the fact that an inordinate amount of mental suffering will visit his loved ones--family and relatives--with the resulting social stigma (irrespective of the peer group from which such may emanate) which ordinarily will require more than one generation to "live down"!

All of the foregoing are but few of the many facets of extreme mental cruelty involved in the imposition and carrying out of the death penalty.

Moreover--and of extremely important significance--is the fact that the death row environment is causative of severe psychosis, and other types of mental illness[13]. Many adverse psychotic symptoms were noted in article based on a study in this respect by Dr. Harvey Bluestone and Carl L. McGahee, *"Reaction to Extreme Stress: Impending Death by Execution"*, published in the American Journal of Psychiatry, November, 1962. Additionally of significance in showing the callousness of those responsible for executing the death sentence--and note the valid, common law precept that no insane man is to be executed--is the case through the prison walls; *Jackson v. Bishop*, 404 F.2d 571, 576 (8th Cir. 1968).

13 *Solesbee v. Balkom*, 339 U.S. 9, 14 (1950),

of a condemned man in the California prison at San Quentin, which is described in the work of Lamott in his *Chronicles of San Quentin--The Biography of a Prison* (David McKay Co.,Inc.,1961), at page 229:

> "Not long ago one condemned man had to undergo two series of electric shock treatments before he was judged to be sufficiently in touch with reality to be killed" (by lethal gas)

What of this man's mental condition prior to this formidable electric shock treatment? If he was in fact insane, which the above indicates to be the case, the state has no business of trying to "jack him up" hurriedly so that he can immediately undergo a horrible death by hydrogen cyanide. It should also be especially noted that the lower Federal court in *Jackson v. Bishop*, 268 F.Supp. 804 (E.D. Ark.1967) held that the use of an electric shocking device in prison to punish inmates is violative of the cruel and unusual punishment provision of the Eighth Amendment (in connection with such prohibition, any electric shocking device which causes convulsions and unconsciousness--which occur during electric shock treatment of insane persons--should be likewise enjoined, particularly if its end result is an immediate execution in the gas chamber!)

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dissenting opinion, Frankfurter,J.

It was reported in the press that the last victim of California's gas chamber had attempted suicide prior to his execution; suicidal ideation,in psychiatric parlance, is practically a determinative indicium of severe mental illness.

Capital punishment also generates an overwhelming amount of mental anguish--hence, mental cruelty--in the prisoner's anticipation of formidable physical pain involved (the physical pain itself,of course, being intrinsically cruel).Two authors of the leading law review article "The Death Penalty Cases" in 56 Calif. Law Rev.1268 (1968) noted what appears to be an inordinate amount of prolonged consciousness (hence,pain) in the executions of two of America's most famous felons (at pages 1339 and 1341 thereof). It is also noteworthy that these authors imply strong agreement with one of your *amici's* basic underlying premises in the first part of this brief that capital punishment infringes religious freedom rights of a prisoner who is or who might become religious (page 1363).

In the case of *Jackson v. Bishop*,it is also extremely significant that the court,speaking through then-Circuit Judge Blackmun, found corporal punishment to violate constitutional proscriptions against cruel and unusual punishment. *A fortiorari* the considerably more harsh, tremendously more painful, execution of death should be abolished, using similar considerations. It is noted that corporal punishment was not held to be violative of the cruel punishment concept several generations ago when such proviso was formulated (a judicial abrogation of capital punishment now accordingly appears more than adequately warranted!)

Capital punishment, by electrocution or by gas[14], is fraught with the possibility of further cruelty by unbridled administrative prerogative in its application. Although electrocution often results in a cruel burning (literally) of the prisoner, lethal gas may also constitute a horrible method of prolonged suffering![15] The death row environment is also being scrutinized by the 5th Circuit(*Sinclair v.Henderson*, Nov 17,1970;No.30025).

[14] *State v. Gee Jon*,211 P.2d 676 (1923)

[15] *Chronicles of San Quentin*,*supra*,page 228.

This Court has heretofore acknowledged an obligation to thoroughly consider and evaluate--free from the judicial strictur of yesteryear--all the relevant factors a circumstances (including many of those no theretofore thought to be judicially cogn zable) in a determination of whether or n a "compelling state interest" exists for particular punishment. The United States Supreme Court in *In re Jenison*, 375 U.S. 1 (1963) --a case involving a woman's refusal to perform service on a jury (due to the proscription in the Sermon on the Mount, "Judge not, that you be not judged" -- remanded the matter to the state court for further consideration in the light of *Sherbert v. Verner, supra.*

The California appellate court has als acknowledged that a "compelling state int erest" must be shown before a particular punishment can be held constitutional[16].

The opinions articulated by another commentator, that there must be a compelli state interest shown when the validity of a law or regulation is in question, are also worthy of note[17].

Capital punishment is utterly devoid o any rehabilitative value. Its carrying ou --within the prison setting--also stifles efforts of the authorities to rehabilitat prisoners incarcerated for other than cap offenses, because of its implied admissio of failure to rehabilitate and its manife disregard for the sanctity of human life.

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16 *People v. Woody*, 394 P.2d 813 (1964)

17 *Wisconsin Law Review Vol. 1966, p. 280 et seq.*

Dr.Sheldon Glueck, the noted Harvard penologist, condemns capital punishment for its adverse consequences on otherwise valid rehabilitative efforts as to those prisoners not under a death sentence, by stating that the death penalty "bedevils the administration of criminal justice and is the stumbling block in the path of general reform in the treatment of crime and criminals". In *Holt v. Sarver*, 309 F.Supp.362 (E.D. Ark.1970), a Federal court held that the entire penitentiary system of Arkansas was violative of cruel and unusual punishment concepts, noting that an effective plan of rehabilitation--which was lacking--is necessary to constitutional validity.

CONCLUSION

The Court is respectfully requested to use its inherent power of judicial notice, in gathering to itself all of the relevant facts which bear on the physical and mental cruelty of the death penalty. It is submitted that the nature of capital punishment, and the formidable circumstances and burdens attendant thereupon, render it unconstitutional in violation of the proscription against cruelty (including mental cruelty resulting from the imminent deprivation of religious freedoms). For the foregoing reasons, the *amici* urge that the judgments below be reversed, thus letting God work his natural, benevolent purposes in this world!

Respectfully submitted,

Paul Raymond Stone,
Attorney for Amici
1901 Huber Road
Charleston, W.Va.

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In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 68-5027

ERNEST JAMES AIKENS, JR.

v.

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BRIEF OF AMICI CURIAE

SUBMITTED BY
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BOARD OF SOCIAL MINISTRY, LUTHERAN CHURCH IN AMERICA
CHURCH OF THE BRETHREN, GENERAL BOARD
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NATIONAL COALITION OF AMERICAN NUNS

WILLARD J. LASSERS
11 S. LaSalle Street
Chicago, Illinois 60603
and
ELMER GERTZ
120 S. LaSalle Street
Chicago, Illinois 60603
Attorneys for Amici

The Scheffer Press, Inc.—Andover 3-6850

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INTRODUCTION

The above religious organizations, by their attorneys, Willard J. Lassers and Elmer Gertz, file this brief amici curiae in support of petitioner. Petitioner and respondent have consented to the filing of this brief.

The religious organizations represent as follows:

The legal arguments on behalf of petitioner will be presented by his counsel. There are, however, a number of ethical considerations of deep concern to the religious organizations. Most of these organizations formally have taken stands in opposition to capital punishment. In the appendix to this brief we include the formal statements of amicus National Council of the Churches of Christ in the United States of America, other amici religious organizations and other denominations. We note additionally that the World Council of Churches at its International Conference at Addis Ababa on January 10-21, 1971, declared,

"Recent events in many countries have compelled us to think especially about capital punishment.

"We are convinced that one significant expression, at this time of history, of the belief of the Christian Church in the sanctity and dignity of human life would be the promotion of common and concerted efforts towards the abolition of capital punishment."

Amici desire to present views somewhat different from that of petitioner and other amici. These views they think will contribute to a more complete understanding of the case.

This brief while formally submitted in *Aikens* v. *California,* No. 68-5027, is relevant also to the three companion cases, *Furman* v. *Georgia,* No. 69-5003, *Jackson* v. *Georgia,* No. 69-5030, and *Branch* v. *Texas,* No. 69-5031. We shall refer to these cases in this brief.

The National Council of the Churches of Christ in the United States of America is a federation of 33 national

denominations with an aggregate membership of about 42,000,000. Among them are several Eastern Orthodox bodies and several predominantly black denominations. The amici other religious organizations have a total membership exceeding 26,400,000 (a portion of which is included among the 42,000,000 just mentioned).

The amici are:

1. NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE UNITED STATES OF AMERICA

The National Council of the Churches of Christ in the United States of America is a federation of thirty-three national denominations with an aggregate membership of approximately 42,000,000. Among them are several Eastern Orthodox bodies and several predominantly black denominations. The National Council of Churches is governed by a General Board of 250 members made up exclusively of representatives of the member denominations proportionate to their size and support and chosen according to their own respective procedures. In September, 1968, the General Board adopted a policy statement urging the abolition of the death penalty, by a vote of 103 for, 7 against, and 0 abstaining.

2. AMERICAN FRIENDS SERVICE COMMITTEE

The American Friends Service Committee has, since 1917, engaged in religious, charitable, social, philanthropic and relief work on behalf of the several branches and divisions of the Religious Society of Friends in America. There are approximately 123,000 Friends in the United States. The American Friends Service Committee, although it cannot speak for all Friends, has a vital interest in this litigation because of Friends' historic and continued opposition to the taking of human life by the State. Such

opposition to capital punishment goes back more than 300 years, to the beginning of the Quaker movement and stems from Quaker belief that there is an element of the divine in every man.

3. BOARD OF SOCIAL MINISTRY, LUTHERAN CHURCH IN AMERICA

The Board of Social Ministry is an instrumentality of the Lutheran Church in America. Its object is "to inquire into the nature and proper obedience of the church's ministry within the structures of social life . . . devoting itself in particular to those aspects of the church's ministry in which individual and social needs are met as an expression of Christian responsibility for love and justice."

The 1966 biennial convention of the Lutheran Church in America adopted a social statement on capital punishment urging abolition of capital punishment. The Lutheran Church in America has 3,300,000 members in 6,225 congregations in the United States and Canada.

4. CHURCH OF THE BRETHREN GENERAL BOARD

The Church of the Brethren General Board is the administrative arm of the Church of the Brethren. It carries out policies adopted by the church's legislative arm—Annual Conference—in the areas of world ministries, parish ministries and general services. Among its world ministries are efforts to correct social injustices at home and abroad. The Church of the Brethren has adopted policy statements opposing capital punishment on several occasions, the last one being in 1959 at the Annual Conference. The Church of the Brethren has 200,000 members in approximately 1,000 churches.

5. COUNCIL FOR CHRISTIAN SOCIAL ACTION OF THE UNITED CHURCH OF CHRIST

The Council for Christian Social Action is an instrumentality of the United Church of Christ devoted to promoting education and action in international, political and economic affairs. The Council stated its position in opposition to capital punishment in a policy statement of January 30, 1962. The United Church of Christ has over 2,000,000 adherents.

6. DEPARTMENT OF CHURCH IN SOCIETY OF THE CHRISTIAN CHURCH (DISCIPLES OF CHRIST)

The Department of Church in Society of the Division of Homeland Ministries is a part of The United Christian Missionary Society, a national unit of the Christian Church (Disciples of Christ). The Christian Church has approved two resolutions on capital punishment in its International Convention. The first resolution, approved in October 1957 at Cleveland, Ohio, stressed the need for rehabilitation of criminals and indicated that "the practice of capital punishment stands in the way of more creative, redemptive and responsible treatment of crime and criminals. The second, "Concerning Abolition of Capital Punishment," was approved in the October 1962 Assembly of the International Convention at Los Angeles, California. This resolution specifically placed the Christian Church (Disciples of Christ) on record as "favoring a program of rehabilitation for criminal offenders rather than capital punishment."

The Christian Church (Disciples of Christ) in the United States and Canada has a membership of 1,600,648.

7. THE RT. REV. JOHN E. HINES, PRESIDING BISHOP OF THE EPISCOPAL CHURCH IN THE UNITED STATES

The Presiding Bishop is the president of The Domestic and Foreign Missionary Society of The Protestant Episcopal Church in the United States of America which has 7,464 parishes and missions, 11,772 ordained clergy and 3,475,164 baptized members. The Episcopal Church at its 1958 General Convention adopted a resolution in opposition to the death penalty.

8. GENERAL BOARD OF CHRISTIAN SOCIAL CONCERNS OF THE UNITED METHODIST CHURCH

The General Board of Christian Social Concerns is an instrumentality of the United Methodist Church. Its purpose is to further the works of the church in the sphere of social affairs. The United Methodist Church at its 1960 General Conference adopted a statement opposing the death penalty. The statement was revised in 1964 and is now part of United Methodist Social Policy. The United Methodists number 11,000,000 members among their 38,000 churches which are situated in every state.

9. GREEK ORTHODOX ARCHDIOCESE OF NORTH AND SOUTH AMERICA

The Greek Orthodox Church expresses the belief that every person should be afforded every opportunity to establish his innocence. If he is found guilty, he should be afforded every opportunity to present what evidence he can to mitigate his guilt. The Greek Orthodox Church consists of 500 parishes, largely in the United States and Canada, and some in Central and South America. The membership of the Church is 1,500,000.

10. THE AMERICAN ETHICAL UNION

The American Ethical Union is a federation of the Ethi-
l Culture Societies and Fellowships in the United States,
ich, collectively constitute a liberal religious humanist
llowship known as the "Ethical Movement" or the "Ethi-
l Culture Movement."

The first Ethical Culture Society was founded in New
rk City in 1876 by Dr. Felix Adler. There are today 24
cieties and Fellowships of the American Ethical Union
ten states and the District of Columbia. The American
hical Union is a member of the International Humanist
d Ethical Union, a world-wide organization, with head-
arters in Utrecht, The Netherlands. Religious humanists
pose the death penalty. The American Ethical Union
s adopted policy statements calling for its abolition, and
embers and Leaders (Ministers) of Ethical Culture So-
ties have been active and, in many instances, in the fore-
nt of organized efforts to have the death penalty
olished throughout the United States.

11. THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA BY MRS. RALPH M. STAIR, MODERATOR AND WILLIAM P. THOMPSON, STATED CLERK OF THE GENERAL ASSEMBLY

The United Presbyterian Church adopted a statement
ndemning the death penalty at its 171st general assembly
1959 and adopted a revised statement at the 177th Gen-
l Assembly in 1965.

The United Presbyterian Church in the United States of
nerica has a membership of 3,100,000. It has 8,662
urches throughout the nation.

12. NATIONAL CATHOLIC CONFERENCE FOR INTERRACIAL JUSTICE

The National Catholic Conference For Interracial Justice is a service agency formed in 1960-61 out of the Catholic Interracial Council movement. It is an independent "lay" agency, not an official Church agency, though it is recognized by the Church and maintains close relationships with official national Roman Catholic agencies, with the leaders and structures of many local dioceses, and with a large number of religious orders of men and women.

Much of the energy of the Conference is devoted to moving the Catholic community more deeply into the struggle for interracial justice, and for the disadvantaged, and into cooperative work with other denominations and secular agencies. The Conference initiated, organized and served as secretariat for the historic 1963 National Conference on Religion and Race, involving some 70 denominational groups.

The Conference offers specialized services in the fields of employment (Project Equality), education, urban services and is initiating a new project in the field of religious ministries to the police. It serves over 150 human relations and urban service organizations sponsored by the Roman Catholic community.

13. THE NATIONAL COALITION OF AMERICAN NUNS

The National Coalition of American Nuns is an organization of Roman Catholic Sisters whose purpose is to study and speak out on issues related to human rights and social conscience. The coalition was established in July, 1969. It numbers 1,937 sisters.

SUMMARY OF ARGUMENT

The death penalty is a cruel and unusual punishment because of the inherent fallibility of every judicial proceedings. There is the possibility of the execution of an innocent man. Every stage and every aspect of the judicial proceedings reveal the wrong we do when we take human life by judicial process: we permit the defendant to plead and bargain with his own life as a counter; we force a scrupled juror to consider a penalty he disavows. The outcome of a trial sometimes depends on chance factors such as the availability and admissibility of evidence; life or death may depend on determination of complex subjective questions such as motive or the voluntariness of a confession. The judicial rules, substantive and procedural, are shifting: men have been executed on the basis of rules shortly changed. The death penalty sometimes is employed as a form of suicide; thus, instead of decreasing murder, it may increase it. The treatment of the condemned man, the wait, the setting of death dates and granting of stays all inflict unbearable torture. The execution itself is ghastly.

The evils of the death penalty are not remediable. They are inherent and can end only with the end of capital punishment.

ARGUMENT

I.

THE PUNISHMENT OF DEATH IS CRUEL AND UNUSUAL

The religious organizations support petitioners in the case at bar and three companion cases. In view of the certiorari grant, the religious organizations will consider primarily the impact of the death penalty upon the individual.

Its impact upon society we shall mention only incidentally. Yet we should note that some of the most telling arguments against capital punishment stress its negative social effects. Study after study has shown that it fails as a deterrent.[1] The death penalty is a costly waste of money, because it protracts trials, increases the number of appeals and increases custodial expense. It corrodes and brutalizes society. Some aspects of this process we shall touch on.

We assert that the death penalty for any crime is cruel and unusual punishment within the meaning of the Eighth Amendment. We focus on the death penalty for murder, but our arguments apply generally with equal force to the death penalty for rape and other crimes.

In brief compass our contention is that life ought not to stand forfeit upon human judgments. Such judgments are necessarily fallible. This proposition we think is true at every level of the judicial process: the defining of capital crimes, the making of factual determinations, the weighing of subjective factors such as motive, capacity and mental status. No judge and no jury is without bias; no judicial proceedings exempt from flaw.

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[1] For representative studies, see Bedau, *The Death Penalty in America*, Chap. 6, p. 258, et seq. (hereafter "Bedau").

We shall review pending and recent cases, not primarily for the legal principles they enunciate, but for the lessons they teach regarding the limitations of the judicial process and of man himself.

Our thesis does not rest simply on the argument often cited for abolition of the death penalty—the possibility of judicial error. It is, of course, beyond cavil that a man wrongly condemned has suffered cruel and unusual punishment. We need not speculate, moreover, on the possibility of such a fearful miscarriage of justice: it has occurred.

On March 9, 1950, Timothy John Evans was hanged in London for the murder of his wife and baby, his appeal to the Court of Criminal Appeal having been dismissed (February 20, 1950). A witness against him was his landlord, John Reginald Christie. In 1953, the bodies of Mrs. Christie and several others were found on the premises. Christie was convicted of the murder of Mrs. Christie and hanged.

Doubts immediately arose as to the guilt of Evans.[1] On October 18, 1966, Queen Elizabeth II granted Evans a posthumous pardon.[2]

Ordinarily, following an execution, there is no longer sustained interest in a case. If an injustice has been done, it is beyond recall. The legal remedies for post death exoneration are ill-defined. Hence, there are but few cases of official

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[1] For the transcript of both trials, see *Trials of Timothy John Evans and John Reginald Halliday Christie*, Jesse ed., Notable British Trials (Hodge and Co., Ltd., 1957). The judgment of the Court of Criminal Appeal in *Rex* v. *Evans* appears at p. 297. Christie did not appeal.

[2] New York Times, October 19, 1966, p. 19, Col. 3.

recognition of judicial error. Nonetheless, there is extensive literature regarding wrongful convictions in both capital and noncapital cases.[1] If we continue executions, doubtless we shall again put to death innocent men.

But our argument is more comprehensive. We think it cuts deeper, that it reveals the inherent limitations of the judicial process, particularly in capital cases. Let us look to the various stages and aspects of the criminal trial to explore more fully its pernicious effect.

The very existence of the death penalty gives the prosecution an enormous advantage. Often, in exchange for a plea of guilty, the prosecution will drop a demand for a death sentence. The defendant faces a fearful choice: shall he hazard his life to seek acquittal? Yet the defendant usually does not know precisely the strengths or the weaknesses of the prosecution's case, and, consequently, lacks full knowledge necessary for an informed decision. Even if we had full pre-trial discovery in criminal proceedings, as we do in civil proceedings, the defendant would not be in a position to predict with precision the outcome of the trial. The outcome of every trial is uncertain.

For the defendant to make a "rational" decision when he bargains with the prosecution, the issue is not whether he is in fact "innocent" or "guilty" but rather what is the *probability* that he will be found guilty or not guilty. Thus, the innocent defendant cannot afford to dismiss the negotiating process without taking a cold and calculating look at the strength and weakness of his case as it will be viewed by the court and jury. The defendant who is "guilty" must do the same. And so must the defendant who does not know

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[1] See MacNamara, *Convicting the Innocent*, 15 Crime and Delinquency 57 (1969).

whether he is "innocent" or "guilty". (Thus, suppose a possible defense of mental incompetency or self defense.) The defendant may be called upon to make a crucial decision even though woefully ill-equipped to do so.

The death penalty is for some, not a punishment for murder, but a punishment for refusing to plead guilty to murder.[1]

Indeed, there is the grim possibility that a prosecutor who threatens to ask for the death penalty as a device to obtain a plea of guilty may feel forced to make such a demand if the defendant insists upon trial. In such case the death penalty may be sought not because the prosecutor feels that it is appropriate, or that he wishes it, but as an unfortunate concomitant of an unsuccessful negotiating session.

We are aware of the decisions in *North Carolina* v. *Alford*, 400 U.S. 25 (1970) and *Brady* v. *U.S.*, 397 U.S. 742 (1970) upholding pleas of guilty against claims that they were induced by fear of the death penalty. The Eighth Amendment question here at bar, however, was not there before this Court. The defendants there did not receive death sentences. Here, the broader issue, in light of the certiorari grant, is the death penalty as such. Its use as a coercive tactic to obtain guilty pleas, and its imposition where the defendant declines to plead guilty and hazards trial, present issues different from *Alford* and *Brady*.

The moral conflict of the scrupled juror. We move to the jury selection stage of the trial. The decision of this Court in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968) bars exclu-

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[1] In Illinois we are aware of but one case in recent years where a capital sentence was imposed upon a plea of guilty, *People* v. *Wilson*, 29 Ill. 2d 82, 193 N E 2d. 499 (1963). Wilson was not, however, executed.

sion of veniremen simply because they have conscientious scruples against the death penalty. Assuming that such prospective jurors are not removed by peremptory challenge by the prosecution, such jurors are faced with a moral dilemma of substantial proportions. In what circumstances should they lay aside their scruples in order to entertain or impose a punishment which they think morally wrong?

We point up this dilemma not to criticize *Witherspoon*. Many of the religious organizations participating in this amicus brief participated as amici in *Witherspoon*. We think that a jury selected by the *Witherspoon* standard is a fairer jury than one selected by the former rule. It does not, however, contain a full cross section of the public, since it excludes those with fixed and unchangeable scruples. Moreover, when a *Witherspoon* jury is composed wholly or partly of those holding scruples less fixed, a death verdict will be returned only where scruples are overcome.

The trial: the role of chance. We turn to the evidentiary phase of the criminal trial. A criminal trial is a search for the truth, but a stylized search conducted pursuant to rules. In the generality these rules operate insofar as possible to secure reliable, trustworthy evidence. But the very rule that operates to the advantage of one defendant can work to the disadvantage of another who may be on trial for his life. Assume a defense of alibi. If the alibi witness dies before trial, the defense collapses. If the witness lives, but happens himself to have a criminal record, his credibility may be destroyed and no doubt the alibi defense will fail.

Much may depend upon whether crucial evidence has been preserved and whether it is still available to counsel for the defense. This in turn may depend upon how soon after the crime counsel was obtained or it may depend upon

sheer matters of chance. In the fairest of trials fortune plays a large role, favoring now the prosecution and now the defense. Given the most skilled and diligent attorney, the most learned and fairest of judges, the most able of juries, the outcome of a criminal trial may nonetheless be determined by the fall of chance.

In civil litigation the parties have full opportunity to explore, in advance of trial, the opposite party's case. In criminal trials, while the scope of discovery has expanded recently, it is generally less extensive. The defendant may be informed of the witnesses who may be called, but often has no way to compel them to reveal in advance what their testimony may be. True, the law directs the prosecution to reveal evidence favorable to the accused. But unless the defendant learns of the suppressed evidence by fortuitous events, these rules are difficult to enforce.

In the battle, the state has a full range of technical and scientific resources. The defendant usually is granted no such assistance.

Today, skilled representation is rarely enough. Successful defense often requires not only skilled counsel, but also a corps of pathologists, chemists, physicians and other experts, if a crime is to be thoroughly explored and a full defense presented. Yet the state usually provides none of this for the accused. The facts generally must be dug out by counsel.

The trial: subjective determinations. The determination of "objective facts" in a trial is a baffling undertaking. Additionally, nearly every trial requires a determination of the subjective mental state of the accused, sometimes as to several issues. We know so little of the science (or art) of making such a determination that life should not stand forfeit through them.

Let us consider a case in this Court, *Alcorta* v. *Texas*, 355 U. S. 28 (1957). Alcorta came upon his wife one evening in a parked car kissing Castilleja. Alcorta killed his wife. The case came up under the law of Texas, under which, if Alcorta was guilty of murder without malice (a murder arising from "a sudden passion from an adequate cause"), the maximum penalty was five years. The jury, however, found Alcorta guilty of murder with malice. The sentence was death. The jury sat in judgment essentially on a subjective issue: What was Alcorta's reaction to the scene in the car? Or, perhaps more precisely, what should have been the limits of his reaction had he been a reasonable man? The issue was decided unfavorably to Alcorta. The difference was not only the difference between life and death, but the difference between a relatively mild sentence and death. Was the jury aware fully of the social group in which the Alcortas lived? Was Mrs. Alcorta's conduct regarded as heinous in that group? We do not know; we do not know whether the jury knew.

There is another element in the case: At the trial Alcorta testified that he had reason to believe that his wife had been intimate with Castilleja. Such testimony of course raises a new area of inquiry. How "reasonable" were Alcorta's suspicions? In the actual case it turned out that Castilleja had informed the prosecution that he had in fact been intimate with Mrs. Alcorta and accordingly Alcorta's suspicions were well founded. This fact was not presented to the court and jury and, indeed, Castilleja denied having any more than a casual relationship with Mrs. Alcorta. Because of this act of deception, Alcorta's conviction was upset by this Court.

The Alcorta jury was asked to make not an objective but a subjective determination. Subjective determinations take

a myriad of forms: Suppose, for example, a defense of justification. What is a "reasonable belief" that force was necessary in self defense? The defense of insanity and the defense of incapacity to form a specific intent are other illustrations.

The question of subjective determinations may be viewed from another perspective. The Commandment is "Thou shalt not kill." But not all who kill are equally culpable. The law establishes gradations of homicide. These gradations are variously phrased from state to state ("degrees" of murder, etc.). Similarly, there are various defenses, likewise variously described. The law necessarily compresses these gradations and defenses into a few categories. But the circumstances of life are manifold, the causes of each homicide as complex as human personality itself.

The voluntariness of confessions. Determining the voluntary character of a confession, of course, requires a subjective determination. A jury is asked to judge in the quiet of the court room the effect of a given interrogation upon a man whom they do not know. They learn of him as a person only through the testimony of partisan witnesses, given under the stress of trial relating to events which almost invariably are hotly disputed. Consider the case of Charles Townsend. He was first arrested on a murder charge on January 1, 1954 and has been incarcerated continuously since then. He has been on death row for 16 years, 4 months (since April 7, 1955). His case is now the oldest case in the nation. Counting from his first arrest, it is probably the longest capital case in American history (17 years, 7 months). His case was last in this Court in 1963 (*Townsend* v. *Sain,* 372 U.S. 293).

Townsend was convicted of murder and sentenced to death by the Criminal Court of Cook County. Characteriz-

ed by the prosecution as a near mental defective, he was arrested one evening and soon began to suffer withdrawal symptoms. A prison physician administered scopolamine, a drug commonly known as "truth serum." Within an hour and a half after the administration of this drug Townsend confessed to four murders and two robberies. He was tried for one murder and acquitted. He was then tried for the second murder and sentenced to death. The evidence of his guilt, apart from the confession, was simply that one Campbell testified that about the middle of December (the murder took place on December 18, 1953), he saw Townsend walking down the street in the vicinity of the murder with a brick in his hand. A pathologist testified that death was caused by a severe blow to the head of the deceased. The Supreme Court of Illinois affirmed the conviction despite the meagerness of the evidence. Two dissenting justices declared the testimony inherently incredible. Townsend, through counsel serving without fee, then sought relief in the federal court charging that the state suppressed the fact that the drug scopolamine, which its witnesses referred to as hyoscine, was known as truth serum. After numerous appellate proceedings, this Court directed that the District Court give Townsend a hearing.

Further litigation ensued. Only this year, the District Court, for a second time, set aside Townsend's conviction and ordered his release on bond. *U. S. ex rel Townsend* v. *Twomey,* 322 F. Supp. 158 (1971). (The Seventh Circuit has stayed the bond release order.)

The second oldest case on death row is the case of Edgar Smith. Smith was sentenced to death on June 4, 1957, for the murder of a 14 year old girl. For years he fought vigorously in the courts to set aside his conviction. (For unsuccessful attempts, see *U. S. ex rel Smith* v. *New Jer-*

sey, 322 Fed. 2d 810 (CA 3rd, 1963) and *U. S. ex rel Smith* v. *Yeager,* 395 Fed. 2d 245 (CA 3rd, 1968). (Judge Biggs dissented from the denial of a plenary hearing and Judge Freedman from the denial of a rehearing *en banc.* The course of the litigation is traced in 395 Fed. 2d at 247).

On June 8, 1971, the United States District Court for New Jersey, after a plenary hearing, overturned the conviction. Smith was ordered released on bond (Chicago Sun Times, June 9, 1971, p. 18). The Third Circuit, on an expedited appeal, affirmed the order setting aside the conviction, but declined to release Smith on bond.

Perhaps the State will seek certiorari. The merits of the case need not concern us. What must give us pause is that after 14 years a court has ruled that Smith was unjustly convicted. Had he been executed, the error could not have been righted.

The District Courts in both *Townsend* and *Smith* entered bond release orders. These orders illustrate another aspect of the death penalty: Once a defendant wins the right to a retrial, his case often is seen in a new perspective. The crime itself is no longer viewed as one warranting the death penalty, or the quantum of evidence of guilt seems diminished. Other illustrations: James V. Giles and John G. Giles, not long after the decisions of this Court (*Giles* v. *Maryland,* 386 U.S. 66 (1967)) and the Maryland Court of Appeals, *State* v. *Giles,* 245 Md. 342, 227 Atl. 2d 745 (1967) were ordered released on $10,000 bail pending retrial. (N. Y. Times, July 6, 1967, p. 27). Edgar Labat and Clifton A. Poret, sentenced to death for rape in 1953, won a retrial. *Labat* v. *Bennett,* 365 Fed. 2d 698 (CA 5th 1966). In 1969, they pleaded guilty to aggravated rape and were sentenced to the 16 years, 9 months already spent on death row. (N. Y. Times, December 30, 1969).

We have emphasized the subjective elements of every trial. We do not wish to rule out subjective determinations in criminal trials. There is a difference recognized by the law and recognized by mankind generally between a homicide committed as the law used to say, "with malice aforethought" and a homicide committed innocently or negligently or even recklessly. Surely different punishments are in order for these various crimes. But we say, questions of human motivation, responsibility, ability to withstand interrogation, effects of narcotics and alcohol upon the human system, etc., are matters of extraordinary complexity. Medicine generally, and psychiatry in particular, have been able to supply only a feeble light in some areas of these problems. We can, it seems to us, in good conscience reconcile ourselves to the necessity for the resolution of these questions as best they can be resolved by a court or by a jury. Such resolution is necessary as part of the price of human society. But we are tragically in error when we rest decisions of life and death upon these fallible judgments. We exact a price from the individual which society does not need for its protection.

In past years, with unconscious irony, but in light of what we have said, not without justification, the Government used to classify executions among the accidental deaths. (See Statistical Abstract of the United States, 1951, Table 74, p. 69, Footnote 12 for 1900, 1910 and 1920.). Today they are classified among "homicides" by the United States Public Health Service. (Statistical Abstract of the United States, 1970, table 220, p. 145).

Shifting judicial rules, substantive and procedural. We turn to another area: shifting judicial cencepts of the capital crime. The Caryl Chessman case is an illustration. (For a procedural aspect of the case, see *Chessman* v. *Teets*,

354 U. S. 156 (1957)). Chessman was sentenced to death not for murder—he killed no one—but for "kidnapping" during an armed robbery in which the victim suffered bodily harm.

The Supreme Court of California declared that, "It is the fact, not the distance, of forcible removal which constitutes kidnapping . . ." (*People* v. *Chessman*, 38 Cal. 2d 166 at 192, 338 P. 2d 1001 (1959)). Nine years after Chessman was executed in 1960, the Supreme Court of California disaffirmed this construction of the statute (*People* v. *Daniels*, 71 Cal. 2d 1119, 80 Cal. Rept. 897, 459 P. 2d 225 (1969). For the latest development see *People* v. *Mutch*, 93 Calif. Rept. 721, 482 P. 2nd 63 (March 24, 1971).

For an analogous shift in the law, but procedural, rather than substantive, consider the case of Vincent Ciucci. The state alleged that Ciucci shot his wife and three children in order to marry another woman. The state elected not to try Ciucci for all four murders simultaneously. Instead he was first tried for the murder of his wife for which he received a sentence of twenty years. He was then tried for the murder of one child for which he received a sentence of 45 years. Not until he was tried for the murder of the second child did he receive the death penalty, the goal sought at the beginning by the state. This Court in a five to four decision declared that under Illinois law each murder was a separate crime for which Ciucci constitutionally could be indicted and tried separately. (*Ciucci* v. *Illinois*, 356 U.S. 571 (1958)). Ciucci was executed in 1962.

Not long afterward the Supreme Court of Illinois disapproved the practice challenged in *Ciucci*. *People* v. *Golson*, 32 Ill. 2d 398, 207 NE 2d 68 at 75 (1965).

Indeed, even before the execution of Ciucci, Illinois, in 1961, adopted a criminal code requiring that all offenses

known to the prosecuting officer must be prosecuted in a single prosecution. Illinois Rev. Stats. (1971) C.38, §§ 3-3(b), and 3-4). (See the comment of the Joint Committee to Revise the Illinois Criminal Code which appears after Section 3-3 in Smith-Hurd Illinois Statutes Annotated).

Recent death penalty cases in this court: due process aspects. In recent years this Court has had before it four cases challenging procedural aspects of capital cases. *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968); *Maxwell* v. *Bishop*, 398 U.S. 262 (1970); *McGautha* v. *California*, 29 L. ed. 2d 711 (1971) and *Crampton* v. *Ohio*, 29 L. ed. 2d 711 (1971). Every one of these cases raises grave due process questions *apart from the issues presented in this Court.*

Consider *Witherspoon.* In 1963, when the Illinois Supreme Court upheld Witherspoon's death sentence, it granted the request of his court appointed attorney to be relieved of further responsibility. Witherspoon thus was facing the chair with substantial legal channels still open and a right to seek clemency, but without a lawyer. This Court declined a request to appoint counsel. Witherspoon applied to the Illinois Supreme Court to appoint counsel. It promptly did so but the 90 days allowed by law for certiorari had expired. Witherspoon obtained other counsel who conducted a protracted battle in his behalf. After these attorneys had exhausted their efforts, Witherspoon, still under sentence, from his prison cell wrote his own petition which he mailed to the Federal District Court. The District Court appointed counsel to represent him. They successfully carried the case here. This Court declared Witherspoon's death sentence indeed unlawful and ultimately the Supreme Court of Illinois reduced the sentence to a prison term.

For Maxwell, it was a substantial struggle to obtain the right to appeal from the denial of Federal habeas relief

and to stave off execution long enough for the case to be heard.

The District Court denied a certificate of importance and a stay of the execution then set for September 2, 1966. The Court of Appeals declined to grant a certificate or a stay. Mr. Justice White granted a stay late in the evening on September 1. During the October Term, 1966, this Court ordered the Court of Appeals to consider the case. It did so but denied relief. (See 385 U. S. 650 (1967), 398 Fed. 2d 138 at 140 (1968)). Ultimately the case reached this Court (393 U. S. 997 (1968)) raising the two questions later to be decided in *McGautha* and *Crampton*. This Court, however, did not pass upon those issues, but rather remanded the case to the lower courts for resolution of *Witherspoon* questions.

In *McGautha* there is a question whether McGautha or his co-defendant, Wilkinson, fired the fatal shot. (*McGautha*, 29 L ed. 2d at 715). The Courts below appear to have resolved this issue against McGautha and evidently on this basis Wilkinson received a prison term, whereas McGautha received the death penalty. Suppose, however, as McGautha claims, the Courts are wrong! Suppose that Wilkinson fired the fatal shot but falsely accused McGautha in order to save himself!

The Crampton case is an incredible story. Crampton spent years in prison. In September 1967 Crampton's wife, because of his amphetamine addiction, bizarre behavior, and knife threats to her, persuaded him to commit himself to a state mental hospital. In November, 1967, a state hospital physician noted on the chart: "*Prognosis:* Guarded. *Dangers and Warnings:* Under stress, patient could be dangerous to his wife." (R. p. 20 in *Crampton*, O. T. 1970, No. 204). Nonetheless, within a month he was sent home on

Christmas furlough. He overstayed the furlough. Apparently the authorities did not bother to pick him up. He threatened his wife; the police picked him up but released him. By January 17, 1963, he had murdered his wife. Yet a defense of insanity was rejected. What measure of responsibility does the state bear for the death of Mrs. Crampton?

Near the end of the last term this Court set aside the death sentences and remanded for reconsideration several cases in light of *Witherspoon*. Some of these cases too are profoundly disturbing apart from Witherspoon questions.

Witherspoon itself declared that it was retroactive. Several capital defendants had cases on appeal to the Supreme Court of Tennessee. They sought to raise *Witherspoon*, but the 90 days then allowed by statute for filing bills of exceptions had expired. The Supreme Court of Tennessee affirmed the convictions without considering *Witherspoon*, even though it promulgated a constitutional rule. Apparently there was no way to raise the issue in the Tennessee Courts. Upon amendment of the statute, this Court, on certiorari, remanded for reconsideration, *Hunter* v. *Tennessee*, ... U.S. ..... (June 28, 1971).

In *Tajra* v. *Illinois* and *Bernette* v. *Illinois*, ... U.S. ..... 39 L. W. 3566 (June 28, 1971) Martin Tajra and Herman Bernette were indicted for murder. It was the state's theory that Tajra had provided Bernette with a gun and sent him to carry out a robbery. Bernette entered the premises and in the course of the robbery committed a murder. Tajra and Bernette were tried separately. Tajra, sentenced to a prison term, appealed to the Illinois Appellate Court. Bernette was sentenced to death. On appeal to the Supreme Court of Illinois that Court reversed and remanded Bernette's conviction for various trial errors.

People v. *Bernette*, 30 Ill. 2d 359, 197 N E 2d 436 (1964). On Tajra's appeal to the Illinois Appellate Court, that Court held that since the same errors had occurred in Tajra's trial as in Bernette's, he too was entitled to a new trial. *People* v. *Tajra*, 58 Ill. App. 2d 479, 208 N E 2d 9 (1965).

On the second trial, Tajra was sentenced to death. This conviction was appealed to the Supreme Court of Illinois which did not exercise its power to reduce the sentence to a term of years. *People* v. *Bernette* et al., 45 Ill. 2d. 227, 258 N E 2d 793 (1970).

Bernette, ... U.S. ....., 39 L. W. 3566 (June 28, 1971), a black, is a mental defective. Sometime after his conviction he became mentally ill and since January, 1968, has been confined in an institution for the mentally ill. Nonetheless, the Supreme Court of Illinois about 18 months after he had been removed to a mental hospital affirmed his conviction for murder. No note was taken, apparently, of the fact that he had been in a mental institution, nor did the Supreme Court exercise its prerogative to reduce the sentence. *People* v. *Bernette*, 45 Ill. 2d 227, 258 N E 2d 793 (1970).

Prosecution suppression of evidence favorable to accused. The Lyman Moore case now before this Court on certiorari *Moore* v. *Illinois* (cert. gr. June 28, 1971 No. 69-5001) is an instance where the prosecution was aware of but failed to reveal to defendant evidence favorable to him. Moore, now under sentence of death for murder, was arrested for the crime some months after it took place. In the interim the police sought one "Slick" who had boasted of the murder to a bartender shortly after the crime. The bartender informed the police that prior to the boast, he had seen "Slick" at a time when the defendant was in a Federal

prison. Yet this information was never revealed to defense counsel. Had this information been revealed, the bartender's identification of the defendant as "Slick" would have been shaken. This fact, coupled with substantial evidence that at the time of the murder Moore was at work in a distant portion of the Chicago area might have meant acquittal. (See further the amicus brief filed by present counsel in the *Moore* case).

It seems almost past belief that the prosecution would suppress evidence favorable to an accused in a criminal case. Yet there have been repeated instances of such practice even in capital cases. See e.g. *Miller* v. *Pate*, 386 U. S. 1 (1967). (False representation of paint stains on shorts as blood) *Brady* v. *Maryland*, 373 U. S. 83 (1963). (Statement of accomplice that he, not defendant, had shot deceased); *U. S. ex rel Thompson* v. *Dye*, 221 F 2d 763 (CA 3rd 1955), cert. den., 350 U. S. 875 (1955). (Officer testified that defendant was not drunk. Prosecution suppressed contrary testimony of other officers). *U. S. ex rel. Almeida* v. *Baldi*, 195 F. 2d 815 (CA 3rd 1952) cert. den. 345 U. S. 904 (1953) (Prosecution permitted false inference that defendant fired fatal shot); *Ashley* v. *Texas*, 319 F. 2d 80 (CA 5th 1963), cert. den. 375 U.S. 931 (1963) (State failed to reveal medical report that defendant was incompetent); *U. S. ex rel Meers* v. *Wilkins*, 326 F.2d 135 (CA 2d 1964) (Robbery. Prosecution failed to produce eyewitnesses who stated defendant not the robber).

Barbee v. *Warden*, 331 F2d 842 (CA 4th, 1964) (Prosecution permitted false inference that defendant's gun was the lethal weapon); *Turner* v. *Ward*, 321 F2d 18 (CA 10th, 1963) (Suppression of nature of sex attacks); *U. S. ex rel Butler* v. *Maroney*, 319 F2d 622 (CA 3rd 1963) (Suppression during guilt phase of trial of evidence that a struggle

preceded shooting); *Levin* v. *Katzenbach*, 363 F2d 287 (D. C. Cir. 1966) (Bank officer's knowledge of key incidence suppressed); *McMullin* v. *Maxwell*, 3 Ohio St. 2d 160, 209 N E 2d 449 (1965) (Suppression of favorable ballistics report); *Application of Kapatos*, 208 F. Supp. 883 (N. Y. 1962) (Witness's statement that defendant not the murderer); *U. S. ex rel Montgomery* v. *Ragen*, 86 F. Supp. 382 (1949) (Rape case. Suppression of medical report that no rape occurred.)

The four cases at bar: due process aspects. The four cases here at bar raise troublesome questions apart from *Witherspoon* and apart from the Eighth Amendment question. These questions are set out in the petitions for certiorari. Here we will but mention that Aikens waived jury trial at a time when scrupled jurors would have been excluded. Jackson and Branch were sentenced to death for rape. Both are black; both victims, white. Furman and Jackson were sentenced to death after unitary trials. Now the unitary trial in Georgia has been replaced by a two stage trial. (Brief for Respondent in Opposition to Petition for Certiorari, p. 10, in *Jackson*). Thus the trials of both Furman and Jackson, apart from *McGautha*, no longer meet Georgia standards. Should they go to their deaths? Furman's trial lasted but a day.

We have mentioned above the development of the criminal law. Only a generation ago, Illinois executed two men without any appellate review. At that time, Illinois law granted a right of review in the Supreme Court of Illinois to everyone convicted of a felony, except in capital cases. In such cases, review was only by leave of Court. Ill. Rev. Stats. (1951), C. 38, §§ 769 and 769.1. Review was denied to Willard Truelove, and on November 17, 1950, comatose, he was dragged to the electric chair at the Cook County

Jail. Harry Williams similarly was denied review and denied a hearing on the constitutionality of the discrimination. (342 U.S. 934 (February 4, 1952)). He was executed on March 14, 1952.

The very next year the law was changed. Ill. Rev. Stats. (1953) C. 38, § 769.1. Today would we for a moment countenance execution without appellate review? What practices today considered just will we regard tomorrow as a barbarism and wonder that they persisted so long?

The death penalty and suicide. The death penalty raises another deeply disturbing problem. There appear to be some individuals who commit murder in order to receive the death sentence. They ask the state to do for them what they hesitate to do for themselves. In these situations, the death penalty, rather than discouraging murder, appears actually to encourage it. We do not have to speculate as to whether such cases arise. This Court has had first hand experience with the matter. *Rees* v. *Peyton*, 384 U. S. 312 (1966) is such an instance. Rees was sentenced to death. At sentencing Rees said to the judge, "Thank you." Counsel sought review here on certiorari. After the petition had been filed, Rees wrote to this Court and to counsel asking that the petition be withdrawn and all legal efforts halted. The Court ordered inquiry into Rees's mental status.

Another illustration: In 1957, Jack Chester after a long upsetting love affair, killed his fiance. His death sentence was upheld by the Supreme Judicial Court. (*Commonwealth* v. *Chester*, 337 Mass. 702, 150 N E 2d 914) on June 10, 1958. The sequel is related by Dr. Frederick Wiseman: "Chester, aware of commutation efforts on his behalf, wrote to the Governor asking that clemency be denied. He wanted death, not as punishment but as mercy." The responsible authorities recommended commutation. "When told that

the Governor was about to approve their recommendations, [Chester] hanged himself." (Wiseman, *Psychiatry and Law, Use and Abuse of Psychiatry in a Murder Case,*" American Journal of Psychiatry, Oct., 1961, p. 289.

Other recent cases in which a condemned man sought execution are set out in the footnote.[1]

The condemned man, the wait and the execution. In the foregoing pages, we have said much about the criminal proceedings but little about the condemned man. How does he fare? As of December 31, 1968, the median elapsed time for prisoners then under sentence was 33.1 months (NPS

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[1] Andrew Pixley filed a plea of guilty to a murder charge. Upon being sentenced to death, he stated he did not wish to appeal. After his attorneys nevertheless filed an appeal, he wrote to the Wyoming Supreme Court that he wanted no appeal and wished the attorney dismissed (*Pixley* v. *State,* 406 P. 2d 662, at 665, October 19, 1965). The Court heard the appeal nonetheless and affirmed. Pixley was executed on December 10, 1965.

James Donald French, a prisoner, strangled his cellmate. After he was sentenced to death, counsel filed an appeal. Judge Bussey in a concurring opinion stated the defendant "has urged this Court to dismiss his appeal and allow him to be executed, in accordance with the judgment and sentence imposed upon him." *French* v. *State,* 377 P. 2d. 501 (Oklahoma, 1961). The Court nonetheless reversed. A second conviction likewise was reversed. 397 P. 2d. 909 (Oklahoma, 1963).

At the third trial, French "freely admitted the bizarre details of the slaying . . . and described in minute detail the facts and circumstances. . . ." 416 P. 2d. 171 at 178 (Oklahoma, 1966).

After the third conviction, French wrote to the Clerk of the Supreme Court asking that his court appointed attorney be relieved. French was executed August 10, 1966.

For earlier accounts where capital punishment has been employed as a form of suicide, see Sellin, *The Death Penalty* 65 (1959).

Capital Punishment Bulletin, No. 45, August 1969) (Latest published). In Maryland the median was 79 months (the longest) and in Ohio and Kentucky, 16 months (the shortest). Doubtless these medians have since lengthened. But these statistics do not convey the full horror. Generally it appears that men on death row are kept segregated, usually in small cells a few yards from the execution chamber. They do no work. Their opportunities for exercise and recreation are limited.[1] For years a living human being is treated as if dead. He is no longer functionally a member of the community of the living. He lives thus for months or years. Under this regimen some men cease to be men.[2] But the condemned is not allowed to end his suffering himself.[3] The moments preceding the execution are horrible.[4] The execution itself ghastly.[5]

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[1] The routine at San Quentin is described by a condemned man in *N. Y. Times*, July 23, 1971, p. 31. For the routine in New Jersey and New York, see N. Y. Times, May 5, 1971, p. 41.

[2] See Gottlieb, *Capital Punishment*, 15 *Crime and Delinq.* 8 (1969).

[3] Rigid suicide precautions are customary. Gottlieb, *Capital Punishment*, 15 *Crime and Delin.* 8 (1969). Amici Synagogue Council, et al., in *Maxwell* v. *Bishop*, O. T. 1969, No. 13, make the point that the state insists not on death but on the opportunity to put to death a man aware of the event. The sick are cured and insane, if possible, brought to lucidity to achieve this end. This is not punishment but vengeance.

[4] Aaron C. Mitchell, the last man executed in California, we are told, was carried moaning to the gas chamber. His last audible words were, "I am Jesus Christ." (*N. Y. Times*, April 13, 1967, p. 13; Chicago Tribune, April 13, 1967, Sec. 1, p. 8).

[5] See Thomas Gallagher, *Invitation to a Killing*, *N. Y. Herald Tribune*, February 7, 1965.

There is another matter we must touch on. Dostoevsky relates the awful events of December 22, 1849, when he and two comrades were led to the place of execution, ordered to don the white execution shirts and tied to posts. At the last moment, they were untied and informed that the Czar had spared their lives and sentenced them to penal servitude.[1] Almost as unbelievable as the actual event is the nearly incredible fact that it was carefully planned by Czar Nicholas I personally. We would not impose calculated anguish in this fashion as did an autocrat. Yet in the course of granting a condemned man a full measure of due process, we inflict a pain similar to that inflicted on Dostoevsky. A man is condemned and an execution date set. A stay is granted pending appeal. The conviction is affirmed and a new date set. As the proceedings continue, there are new dates and new stays. We do not for a single moment suggest that a condemned man be denied every access to the Courts. The bitter experience of the past makes clear that justice sometimes prevails only after many lost battles. But in the course of doing justice we inflict agony. Not by intent, but by the inherent nature of the system created to do justice.[2]

Summation. Before concluding, we must call attention to the special problems of the cause célèbre. They subject the judicial process to a peculiar torment, and, when they are capital cases, raise doubts never wholly dispelled. Sacco and Vanzetti, the Rosenbergs and Chessman are cases known to all. Other cases are causes célèbre in their region, although not known nation-

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[1] For an account of the event by Dostoevsky, see Mochulsky, *Dostoevsky, His Life and Work,* 140 (Princeton U. Press, 1967).

[2] For but one example, consider the cases of Labat and Paret as related in *Labat* v. *Bennett,* 365 F. 2d. 698 (CA 5th, 1966).

ally. So long as we retain the death penalty, men will go to the grave, not for what they have done, or perhaps not solely for what they have done, but because of who they are, or who the world thinks they are, or because of the domestic or international passions of the times.

Initially we stated as our premise the inherent fallibility of every judicial proceeding. We have traced a number of recent cases to explicate that proposition. Yet one might say that our thesis merely sets out a collection of disparate evils, each subject to remedy, some already remedied. This view misconceives the thrust of our argument. If we correct the evils we see today, tomorrow we would recognize further flaws in the proceedings of today. The evils of today are manifest; they must give us pause: the defendant's plea bargaining with his own life; the scrupled juror asked to lay aside his scruples to vote for death; the possibility of exonerating evidence being lost or simply excluded by the rules of evidence; the numerous shocking instances of prosecution suppression of evidence favorable to the accused; the unsureness in judging subjective questions; doubts as to the voluntariness of confessions; shifting definitions of capital crimes; shifting concepts of due process; last minute stays of execution followed by subsequent reversals; the sentencing to death of mentally ill men. We could readily enlarge our list. Today we would not countenance the execution of a man without appellate review of his case. Tomorrow the practices of today will seem equally unthinkable. Progress sometimes is slow; there is backsliding. Yet today we do know more about man than we did; we venture to think we are less ready to take life. Indeed, perhaps the decline in executions, and more recent halt, is an indication of our growing awareness of our limitations.

Since 1930, we have executed 3859 persons. It is sobering to realize that scarcely any of their trials would survive review today. *Witherspoon* and *Miranda* doubtless would fault the majority. The 3859 men and women we submit have suffered cruel and unusual punishment. Should we continue executions when their deaths are witness to the error of the practice?

We mentioned early in our brief that the death penalty corrodes and brutalizes us. The foregoing account, we think, reveals clearly the fashion in which the death penalty degrades us. It is not only in the imposition of the penalty per se that we are degraded, it is also in the wrongs we tolerate (some just mentioned) in capital cases. It is not alone the condemned man who suffers a cruel and unusual punishment; it is we as well, we in society, who inflict a cruel and unusual punishment on ourselves.

In the sciences, man long ago learned that absolutes elude him. Every advance of knowledge teaches that the world is more subtle than we thought. In the macrocosm we learn that the universe is vaster than we thought, that complex phenomena occur in what we thought a void, that space and time once thought wholly separate are subtly linked. In the microcosm with each more powerful accelerator we discover new subatomic particles and learn of more complex relationships between them.

Even logic and mathematics have not escaped. In the last century we learned that even one of the "self-evident" postulates of Euclid was open to question. Today we accept both Euclidean and non-Euclidean geometries. In our day, Ernest Nagel and James R. Newman tell us,[1] a

[1] 4 *The World of Mathematics, 1668* (1956)

1936 paper by Kurt Goedel came as an "astonishing and melancholy revelation to mathematicians," because it challenged deeply rooted preconceptions concerning mathmatical method.

If the "exact sciences" are thus inexact, what of the criminal law? An ordered society needs the criminal law for its protection; it needs incarceration for some; it does not need to kill anyone for its own protection.

The death penalty is cruel and unusual punishment, because the judicial procedures which would truly warrant and justify such a penalty are beyond man. Such judicial procedures are beyond man, because man is man, imperfect in experience, imperfect in wisdom, imperfect in understanding of his fellow man.

Joseph K, just before being put to death at the end of Kafka's novel, *The Trial,* declares

> "Were there arguments in his favor that had been overlooked? Of course, there must be. Logic is doubtless unshakeable, but it cannot withstand a man who wants to go on living. Where was the Judge whom he had never seen? Where the High Court to which he had never penetrated? He raised his hands and spread out all his fingers." (Knopf, 1959, p. 286).

We can tolerate an imperfect justice if we do not take life, because of the need to protect society. But, we cannot tolerate imperfect justice when we inflict an irreversible penalty.

Moses, shortly before his death, in his final charge to his people declared,

> "Today I offer you the choice of life and good, or death and evil. . . . I offer you the choice of life or death, blessing or curse. Choose life. . . ." (Deut. 30:15-19)

We ask this Court, too, to choose life and good.

Respectfully submitted,

WILLARD J. LASSERS
11 S. LaSalle Street
Chicago, Illinois 60603

and

ELMER GERTZ
120 S. LaSalle Street
Chicago, Illinois 60603
Attorneys for Amici

August 26, 1971

APPENDIX

Policy Statements Opposing the Death Penalty Adopted By Amici and Other Religious Organizations

NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE UNITED STATES OF AMERICA POLICY STATEMENT

ABOLITION OF THE DEATH PENALTY

Adopted by the General Board
September 13, 1968

In support of current movement to abolish the death penalty, the National Council of Churches hereby declares its opposition to capital punishment. In so doing, it finds itself in substantial agreement with a number of member denominations which have already expressed opposition to the death penalty.

Reasons for taking this position include the following:

(1) The belief in the worth of human life and the dignity of human personality as gifts of God;

(2) A preference for rehabilitation rather than retribution in the treatment of offenders;

(3) Reluctance to assume the responsibility of arbitrarily terminating the life of a fellow-being solely because there has been a transgression of law;

(4) Serious question that the death penalty serves as a deterrent to crime, evidenced by the fact that the homicide rate has not increased disproportionally in those states where capital punishment has been abolished;

(5) The conviction that institutionalized disregard for the sanctity of human life contributes to the brutalization of society;

(6) The possibility of errors in judgment and the irreversibility of the penalty which make impossible any restitution to one who has been wrongfully executed;

(7) Evidence that economically poor defendants, particularly members of racial minorities, are more likely to be executed than others because they cannot afford exhaustive legal defenses;

(8) The belief that not only the severity of the penalty but also its increasing infrequency and the ordinarily long delay between sentence and execution subject the condemned person to cruel, unnecessary and unusual punishment;

(9) The belief that the protection of society is served as well by measures of restraint and rehabilitation, and that society may actually benefit from the contribution of the rehabilitated offender;

(10) Our Christian commitment to seek the redemption and reconciliation of the wrong-doer, which are frustrated by his execution.

Seventy-five nations of the world and thirteen states of the United States have abolished the death penalty with no evident detriment to social order. It is our judgment that the remaining jurisdictions should move in the same humane direction.

In view of the foregoing, the National Council of Churches urges abolition of the death penalty under federal and state law in the United States, and urges member denominations and state and local councils of churches actively to promote the necessary legislation to secure this end, particularly in the thirty-seven states which have not yet eliminated capital punishment.

103 For 0 Against 0 Abstentions

AMERICAN BAPTIST CONVENTION
Statement on Capital Punishment

Adopted: Rochester, New York, June 7, 1960

IV. NATIONAL AFFAIRS, 4. Capital Punishment

1. Because the Christian believes in the inherent worth of human personality and in the unceasing availability of God's mercy, forgiveness, and redemptive power, and
2. Because the Christian wholeheartedly supports the emphasis in modern penology upon the process of creative, redemptive rehabilitation, rather than on punitive and primitive retribution, and
3. Because the deterrent effects of capital punishment are not supported by available evidence, and
4. Because the death penalty tends to brutalize the human spirit and the society which condones it, and
5. Because human agencies of legal justice are fallible, permitting the possibility of the executing of the innocent,

We, therefore, recommend the abolition of capital punishment and the re-evaluation of the parole system relative to such cases.

Recog[illegible]ing that at present some states (namely, Alaska, Delaware, Hawaii, Maine, Michigan, Minnesota, North Dakota, Rhode Island, and Wisconsin) have abolished the practice, we encourage Christians to support groups and agencies working for its abolition in the remaining forty-one states.

As capital punishment is abolished, we recognize that society must be protected against release from prison of those whose unredeemed spiritual life, or whose condition of physical or mental health, would endanger others.

We look with favor upon the renewed efforts in our time to abolish capital punishment, urge our members

individually, and our Monthly and Yearly Meetings to unite with others in the task of removing the death penalty from the statute books of the various states, provinces and central or federal governments, and the United Nations.

LUTHERAN CHURCH IN AMERICA

Statement On Capital Punishment

Adopted by the Third Biennial Convention
Kansas City, Missouri
June 21-29, 1966

Within recent years, there has been throughout North America a marked increase in the intensity of debate on the question of abolishing the death penalty. The situation has been accompanied by the actual abolition of capital punishment in ten states and two dependencies of the United States, qualified abolition in three states, and in six states a cessation in the use of the death penalty since 1955. Although the issue of abolition has been widely debated in Canada in recent years, a free vote in Parliament on April 5, 1966, failed to end the legality of the death sentence. However, during the last two years or more, death sentences in Canada have been consistently commuted.

These developments have been accompanied by increased attention to the social and psychological causes of crime, the search for improved methods of crime prevention and law enforcement, efforts at revising the penal code and judicial process, and pressure for more adequate methods in the rehabilitation of convicted criminals. There has been a concurrent concern for persons who, because of ethnic or economic status, are seriously hampered in defending themselves in criminal proceedings. It has been increasingly recognized that the socially disadvantaged are forced to bear a double burden: intolerable conditions of life which render them especially vulnerable to forces that incite to crime, and the denial of equal justice through adequate defense.

In seeking to make a responsible judgment on the question of capital punishment, the following considerations must be taken into account:

1. *The Right of the State to Take Life*

The biblical and confessional witness asserts that the state is responsible under God for the protection of its citizens and the maintenance of justice and public order. For the exercise of its mandate, the state has been entrusted by God with the power to take human life when the failure to do so constitutes a clear danger to the civil community. The possession of this power is not, however, to be interpreted as a command from God that death shall necessarily be employed in punishment for crime. On the other hand, a decision on the part of civil government to abolish the death penalty is not to be construed as a repudiation of the inherent power of the state to take life in the exercise of its divine mandate.

2. *Human Rights and Equality Before the Law*

The state is commanded by God to wield its power for the sake of freedom, order and justice. The employment of the death penalty at present is a clear misuse of this mandate because (a) it falls disproportionately upon those least able to defend themselves, (b) it makes irrevocable any miscarriage of justice, and (c) it ends the possibility of restoring the convicted person to effective and productive citizenship.

3. *The Invalidity of the Deterrence Theory*

Insights from both criminal psychology and the social causes of crime indicate the impossibility of demonstrating a deterrent value in capital punishment. Contemporary studies show no pronounced difference in the rate of murders and other crimes of violence between states in the United States which impose capital punishment and those bordering on them which do not.

In the light of the above considerations, the Lutheran Church in America:

urges the abolition of capital punishment;

urges the members of its congregations in those places where capital punishment is still a legal penalty to encourage their legislatures to abolish it;

urges citizens everywhere to work with persistence for the improvement of the total system of criminal justice, concerning themselves with adequate appropriations, the improved administration of courts and sentencing practices, adequate probation and parole resources, better penal and correctional institutions, and intensified study of delinquency and crime;

urges the continued development of a massive assault on those social conditions which breed hostility toward society and disrespect for the law.

CHRISTIAN CHURCHES (DISCIPLES OF CHRIST) INTERNATIONAL CONVENTION

Cleveland, Ohio, October 11-16, 1957
Statement on Capital Punishment

We believe that Christians can no longer justify support of the practice of capital punishment. It has become increasingly clear that the certainty of apprehension and conviction rather than severity of punishment is the real deterrent to crime. Under such circumstances the death sentence becomes not a real protection to society but only a crude form of vengeance or retributive justice. Christian justification of punishment is always found in the hope of the rehabilitation of the offender; since dead people cannot be rehabilitated we can in no way defend capital punishment on Christian grounds.

In a very real sense also the practice of capital punishment stands in the way of more creative, redemptive, and responsible treatment of crime and criminals: There is the danger that society by concentrating attention on the

execution of a few criminals may mislead its members into thinking that it is dealing effectively with crime prevention. Christians must insist upon the importance of crime prevention and the rehabilitation of offenders rather than upon retribution.

It should be noted that the protection of society can as well be achieved by the imprisonment of certain classes of criminals as by the death sentence. Especially in view of the fact that innocent men have sometimes been mistakenly executed, we must now reject capital punishment as a clumsy, vindictive, and misleading practice that has no place in a Christian or even partially Christian culture. Four states and 27 foreign countries have already outlawed capital punishment. We urge Christians as citizens to work toward the elimination of the death penalty in their own states.

CHURCH OF THE BRETHREN STATEMENT ON CAPITAL PUNISHMENT

Adopted by 1957 Annual Conference

Because we regard human life as sacred, and because we believe that the sixth commandment has application to organized societies as well as to individuals, we stand ready to give our support to legislation, now proposed in many states, for the abolition of capital punishment.

STATEMENT ON CAPITAL PUNISHMENT

Adopted by 1959 Annual Conference, June 20, 1959

Because the Church of the Brethren holds that the sanctity of human life and personality is a basic Christian principle which the state is also committed to uphold; and because we believe that capital punishment does not really serve the ends of justice, often resulting in tragic and irrevocable miscarriages of justice;

We commend current efforts to abolish capital punishment, and call upon Brethren everywhere to use their influence and their witness against it.

GENERAL CONFERENCE MENNONITE CHURCH
CENTRAL DISTRICT CONFERENCE, GENERAL
CONFERENCE MENNONITE CHURCH

April 23-26, 1959 annual session at Goshen, Indiana

STATEMENT ON CAPITAL PUNISHMENT

Be it resolved that the secretary of the conference be instructed to write to the governors of the various states within our conference area where capital punishment is practiced to register our concern that this taking of life be discontinued, and that a redemptive approach be exercised in the treatment of all criminals.

THE METHODIST CHURCH.
Doctrine and Discipline of the
Methodist Church, 1964.

"The Methodist Social
Creed, Par. 1820. p. 661."

"We stand for the application of the redemptive principle in treating law offenders and for study and action directed toward the improvement of laws, correctional facilities and services, and court procedures in order to facilitate rehabilitation. For this reason we deplore capital punishment. We do not believe an individual should be excused for his personal responsibility to society; but we recognize that crime, and in particular juvenile delinquency leading to crime, is often a result of family failure and bad social conditions. Christian citizens and churches have a special opportunity and responsibility for creating those conditions of family life and social surroundings, wholesome recreation, vocational training, personal counselling, and social adjustment by which crime may be reduced, and offenders rehabilitated and redeemed by God's grace."

THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA

5th General Convention, Florida, Oct. 16, 1958.
Capital Punishment

Inasmuch, as the individual life is of infinite worth in the sight of Almighty God; and

Whereas, The taking of this human life falls within the province of Almighty God and not within the right of man therefore be it,

Resolved, That the General Convention goes on record as opposed to capital punishment.

UNION OF AMERICAN HEBREW CONGREGATIONS

Resolution on Capital Punishment

Unanimously adopted by the 45th Biennial General Assembly, Miami Beach, Fla., Nov. 14-19, 1959:

We believe it to be the task of the Jew to bring our great spiritual and ethical heritage to bear upon the moral problems of contemporary society. One such problem, which challenges all who seek to apply God's will in the affairs of men, is the practice of capital punishment. We believe that in the light of modern scientific knowledge and concepts of humanity, the resort to or continuation of capital punishment either by a state or by the national government is no longer morally justifiable.

We believe there is no crime for which the taking of human life by society is justified, and that it is the obligation of society to evolve other methods in dealing with crime. We pledge ourselves to join with like-minded Americans in trying to prevent crime by removal of its causes, and to foster modern methods of rehabilitation of the wrong doer in the spirit of the Jewish tradition of tshuva (repentance).

We believe, further, that the practice of capital punishment serves no practical purpose. Experience in several

states and nations has demonstrated that capital punishment is not effective as a deterrent to crime. Moreover, we believe that practice debases our entire penal system and brutalizes the human spirit.

We appeal to our congregants and to our co-religionists, and to all who cherish God's mercy and love to join in efforts to eliminate this practice which lies as a stain upon civilization and our religious conscience.

CENTRAL CONFERENCE OF AMERICAN RABBIS

The annual convention of the Central Conference of American Rabbis, meeting in Chicago, Illinois, June 24-29, 1958, approved the following statement:

The question of capital punishment is now under official study in several states. The Central Conference of American Rabbis urges the abolition of the death penalty where it is still in effect. We are convinced that it does not act as an effective deterrent to crime.

UNITED SYNAGOGUE OF AMERICA

The Executive Council of the United Synagogue of America on March 7, 1960 adopted the following resolution:

Judaism has always regarded capital punishment repugnant to its tradition and to the most noble instincts of man. Even where the Bible prescribes such a punishment Jewish rabbinic and ethical tradition have so interpreted this sanction as to make its application virtually impossible.

Man has been created in God's image, and as such is endowed with sanctity. His life is God-given and his life ends by the grace of God. No man individually or group of men collectively may take the life of another even in what may seem to be just retribution to society for a heinous crime.

The United Synagogue of America believes that the time has come for the abolition of capital punishment from the

statute books of all states and provinces and we urge this course upon the various legislatures and the governors of states and provinces where capital punishment is still in force.

UNITARIAN UNIVERSALIST ASSOCIATION
MAY 13, 1961

Boston, Massachusetts
Capital Punishment

Whereas: Respect for the value of every human life must be incorporated into our laws if it is to be observed by our people; and

Whereas: Modern justice should concern itself with rehabilitation, not retribution; and

Whereas: It has not been proved that fear of capital punishment is a deterrent to crime; and

Whereas: Human judgments are not infallible, and no penalty should be used which cannot be revoked in case of error; and

Whereas: Capital punishment has not always been used impartially among all economic and racial groups in America;

Therefore Be It Resolved: That the Unitarian Universalist Association urges its churches and fellowships in the United States and Canada to exert all reasonable efforts toward the elimination of capital punishment; and

Be It Further Resolved: That copies of this resolution be sent to the Governors of all states in which capital punishment has not yet been eliminated, and to the Canadian Minister of Justice.

UNITED CHURCH OF CHRIST

Policy Statement Adopted by the General Synod at Boston, June, 1969, on the Abolition of Capital Punishment.

Whereas, the Committee for Racial Justice, the Council for Christian Social Action, and the UCC Ministers for

Racial and Social Justice are unalterably opposed to capital punishment and cannot remain silent regarding its continuance in our society, and

Whereas the human agencies of legal justice are fallible, and

Whereas we are concerned about the disproportionate number of black and poor who occupy death row and, white or black, are victims of an evil which decent people of our society have too long endured and which violates categorically our Judeo-Christian ethic, and

Whereas this outdated and barbaric practice has been found to discriminate on the basis of skin color and economic condition, and

Whereas the last-minute stay of execution of a 17-year-old Marie Hill in the gas chamber of North Carolina reminds us that one of the gross injustices in our judicial system is the retention of this barbaric practice,

Therefore Be It Resolved that the United Church of Christ commit itself to join in a nationwide campaign for the abolition of capital punishment and call upon other secular and religious institutions to join in a maximum effort for the abolition of capital punishment in the following:

a) Enlisting the support of Conferences and of other denominations and agencies and cooperating with existing efforts to abolish capital punishment.

b) Developing legislative and other political action for the abolition of capital punishment.

c) Resisting efforts to reinstitute capital punishment in those states where it has been abolished.

d) Testing the constitutionality of laws permitting capital punishment.

e) Making available and assisting in the raising of funds to pursue the above.

THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA
177th General Assembly, 1965

CAPITAL PUNISHMENT

1. Whereas, we believe in the sovereignty of God's grace and in his power to redeem and restore the lost to meaningful and useful life.

2. Whereas, we further believe in the ultimate significance of each individual person as one for whom Christ died.

3. Whereas, several states in this land have recently entered into reconsideration of capital punishment as part of their penal systems.

4. Whereas, we note both the grave and irrevocable nature of execution as punishment and that statistical evidence consistently asserts the failure of the death penalty as a deterrent of crime.

5. Therefore, the 177th General Assembly (1965) reaffirms the action of the 171st General Assembly (1959), and:

a. Declares its opposition to capital punishment.

b. Calls upon the judicatories and members of The United Presbyterian Church in the United States of America to work for the abolition of the death penalty in their respective states.

6. We further call upon the legislatures of those states in which capital punishment is still practiced to hasten to eliminate this punishment from their penal code.

NATIONAL CATHOLIC CONFERENCE FOR INTERRACIAL JUSTICE

The National Catholic Conference for Interracial Justice seeks declaration that capital punishment is unconstitutional.

The majority of those who have died and who now await death by capital punishment are members of minority groups. Thus, it seems a reasonable judgment that legal tools and equal treatment of due process are denied to some Americans. This in itself is unreasonable and harsh.

The National Catholic Conference for Interracial Justice seeks reorganization of the legal and penal systems which could bring about reconciliation of offenders with society. Reconciliation of man with himself and his fellow man is an ideal for which we are obliged to search.

Capital punishment is acknowledgment of our failure to believe in the principle of life and hope inherent in the heart of each human being.

Capital punishment is a cruel and unreasonable alternative to an already inhuman penal system in which the poor, who are oftentimes also minorities, suffer intolerably.

THE NATIONAL COALITION OF AMERICAN NUNS

Capital punishment denies inherent human rights such as the ideal of man's equality, the ideal of general and equal law, the right of due process and the manifold malfunction of court systems which should insure these rights.

Our development in the Judeo-Christian ethic calls for recognition of capital punishment as cruel and unreasonable. Attitudes, so deeply rooted in the mystery of man's psyche play a prominent role in determining guilt, or innocence; life and death. Contending within this psyche and prompting these decisions are such accidents as race, creed, sex, economics, etc. These variants make decisions on capital punishment unequal and unjust for those individuals who find themselves in subcultures of society.

FILE COPY

AUG 26 1971

E. ROBERT SEAVER, CLE

IN THE

Supreme Court of the United States

October Term, 1971
No. 68-5027

EARNEST JAMES AIKENS, JR.,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of California.

Brief Amicus Curiae of the Committee of Psychiatrists for Evaluation of the Death Penalty.

DONALD M. WESSLING,
611 West 6th Street,
Los Angeles, Calif. 90017,
Attorney for Committee of Psychiatrists for Evaluation of the Death Penalty

Of Counsel:
FREDERICK A. RICHMAN.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Brief Amicus Curiae of the Committee of Psychiatrists for Evaluation of the Death Penalty.

Statement of Interest of the Amicus.

The Committee of Psychiatrists for Evaluation of the Death Penalty filing this brief amicus curiae is composed of practicing psychiatrists who also have major responsibility for developing new knowledge about human nature and for educating others in the most advanced degrees of psychiatric thought.[1] Many of these psychiatrists have had direct experience with men sentenced to death. Because psychiatrists are regularly called upon to testify in cases involving the death penalty and to certify the sanity of men sentenced to death, they are in a position to bring before this Court some views of the nature and effect of the death sentence which might not be stressed by other parties.

Consent of the parties for the filing of this brief amicus curiae has been sought and obtained. Copies of the parties' letters will be submitted to the Clerk with this brief.

[1]See Appendix for list of psychiatrists composing the Committee.

ARGUMENT.

I.

Capital Punishment Constitutes Cruel and Unusual Punishment Because of the Psychological Torture Which It Inflicts.

In *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958), this Court held that the crux of the Eighth Amendment is its prohibition of "inhuman treatment" and its incorporation of a maturing society's "evolving standards of decency." The Court recognized that the protection of the Amendment extends far beyond primitive tortures; it prohibits any punishment which violates "the principle of civilized treatment." *Id.* at 99.

In *Trop* the Court ruled that denationalization was a cruel and unusual punishment for desertion. In so ruling, the Court based its finding of cruelty largely upon the extreme psychological pain which such a punishment inflicted. The plurality opinion of the Chief Justice stated that denationalization was offensive to the cardinal principles of the Constitution because it "subjects the individual to a fate of ever-increasing fear and distress." *Id.* at 102. The concurring opinion of Mr. Justice Brennan, which was necessary for a majority, stated that "(t)he uncertainty, and the consequent psychological hurt, which must accompany one who becomes an outcast in his own land must be reckoned a substantial factor in the ultimate judgment." *Id.* at 111.

In the psychological pain it inflicts upon men waiting to be executed, capital punishment far exceeds denationalization as inhuman treatment. Indeed, the psychological effects of the death sentence are really an *additional* punishment that is cruel and inhumane in itself. It is an important aspect of capital punishment

that a man sentenced to death does not simply lose his life. He is also subjected, during his last months or years, to a psychological punishment perhaps worse than his execution.

Psychiatrists, wardens and others who have had direct contact with condemned men have documented the brutal mental deterioration of men on death row.[2] Dr. Louis J. West has noted that

> "A good many of these doomed men end up in the hands of the psychiatrist. The strain of existence on Death Row is very likely to produce behavioral aberrations ranging from malingering to acute psychotic breaks." L. J. West, "A Psychiatrist Looks at the Death Penalty," paper presented at the 122nd Annual Meeting of the American Psychiatric Association, May 11, 1966.

Those prisoners who escape psychosis frequently experience other reactions to the stress of impending death: insomnia, withdrawal, depression, paranoia, obsessive rumination, anxiety and delusions.[3] The damage is increased by the steadily lengthening time which prisoners spend on death row. The average time spent under death sentence was 16 months as of 1960; as of 1965 it was nearly *four years.*[4]

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[2]For case studies, see C. Duffy, *The San Quentin Story* (1950); *88 Men and 2 Women* (1962); G. Gottlieb, *Capital Punishment* (Center for the Study of Democratic Institutions 1967).

[3]For a description of actual cases involving these reactions, see Bluestone and McGahee, "Reaction to Extreme Stress: Impending Death by Execution," 119 Am. J. of Psychiatry 393 (Nov. 1962)

[4]H. Bedau, "The Courts, the Constitution, and Capital Punishment," 1968 Utah L. Rev. 201, 224. Bedau notes that there are prisoners who have been on death row for more than 14

(This footnote is continued on next page)

This psychological anguish is inherent in the idea of imprisoning men to await certain death. Hence, it cannot be diminished even though more "efficient" or "humane" ways of killing are developed. Dr. Isidore Ziferstein has concluded:

> "In less 'civilized' societies the slow torture of the condemned man was an important part of the execution. Procedures like crucifixion were public, and they inflicted prolonged torture. They were rationalized by the magical assumption that the condemned man's suffering might purify his soul and might lead to repentance before he finally died. These sadistic spectacles were also rationalized as socially valuable deterrents.
>
> "Modern techniques of execution have aimed at minimizing the physical pain of dying (although we do not really know how much pain is experienced in electrocution or execution by gas). *But these modern techniques have retained to the fullest the exquisite psychological suffering of the condemned man.*" Ziferstein, "Crime and Punishment," Center Magazine 84 (January 1968) (emphasis added).

The suffering of the condemned man is aggravated by his knowledge that the death penalty is rarely ap-

---

years, and concludes: "there is every reason to expect that during the next decade, unless the death penalty is abolished or radical procedural reforms are introduced, it will be commonplace for persons to spend between five and ten years under death sentence before final disposition of their cases." Id. The possibility that the average length of time on death row may have been increased in part because of the condemned prisoners' own appeals does not justify the increased psychological anguish involved. It would be strange if a prisoner were held "estopped" to challenge his punishment as cruel and unusual because he had exercised fully his rights of review.

plied, that the wealthy and influential are relatively safe from it, and that many states and nations have already abolished it. Accidents of circumstance, time, and geography thus appear, almost frivolously, to be determinants in the loss of his life. The irrevocability of that punishment means that no subsequent change in circumstance or law can possibly be of benefit to him, so that even the thin sustenance of hope is lost.

Furthermore, the person awaiting legal execution today lives in a time when the sacred quality and value of human life have been increasingly recognized and protected by law. The condemned man awaits extermination by the state under conditions in which no *individual* would be morally or legally justified in taking a life. Under modern conventions even an enemy soldier in combat, once captured and subdued, may not be killed. The moral and legal precept that *no man has the right to kill a helpless captive* is now sufficiently universal that the condemned prisoner suffers the additional anguish of realizing that the state, coldly and impersonally, will commit against him an act denied to any individual, regardless of passion or provocation.

These psychological cruelties inherently accompany the institution of capital punishment. In and of itself, the taking of life may constitute the "inhuman treatment" which the Eighth Amendment prohibits. But coupled with the extreme psychological suffering which precedes it, extending over an average of four years, capital punishment surely violates standards of decency and civilized treatment.

II.

Capital Punishment Serves No Legitimate State Purpose Which Could Not Be Achieved by Other Means.

Where important consitutional rights are involved, a state cannot justify their infringement without a showing of a *compelling* state interest. *Sherbert v. Verner*, 374 U.S. 398 (1963) (freedom or religion); *NAACP v. Button*, 371 U.S. 415 (1963) (freedom of expression); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel). Such a showing cannot be made where there are other, less harsh means to achieve the state's purpose. *Shelton v. Tucker*, 364 U.S. 479 (1960). The state must employ available, "less drastic means" where they adequately protect the interest involved. *Id.* at 488.

The legitimate governmental interests in the punishment of criminals are (1) rehabilitation, (2) isolation, and (3) deterrence. See *Rudolph v. Alabama*, 375 U.S. 889, 891 (1963) (Goldberg, J. dissenting). Of these interests, the first is obviously irrelevant to capital punishment and the second is served equally by capital punishment or life imprisonment. Regarding the third interest, not only is there no evidence that capital punishment is an effective deterrent, but there is also a body of psychological evidence suggesting that capital punishment is an *incentive* to violence.

No study has yet shown that capital punishment deters crime.[5] One reason is that crimes are committed for reasons other than a rational weighing of conse-

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[5]See *The Death Penalty in America*, 588-332 (H. Bedau, ed. 1964); United Nations Department of Economic and Social Affairs, *Capital Punishment*, (ST/SOA/SD/9-10) 123 (1968); President's Commission on Law Enforcement and Administration of Justice, *Report* (*The Challenge of Crime in a Free Society*) 143 (1967).

quences. To the extent criminals anticipate the consequences of their conduct, they do so in terms of whether or not they will be caught. They do not commit crimes after deciding that, on balance, the punishment seems fairly light for the crime contemplated.[6] Thus there is not only no statistical support for the belief that capital punishment deters crime more effectively than life imprisonment, but there is no psychological reason for believing that it would so function. Even assuming that there is an appreciable difference to criminals between capital punishment and life imprisonment, it is not the kind of consideration which would determine whether a crime of violence would be committed.

On the other hand, strong psychological reasons exist for believing that capital punishment serves to legitimize killing as a solution to human problems and actually to incite certain warped mentalities to kill. Dr. West and Professor Thorsten Sellin have described the phenomenon of attempting suicide by committing a murder: documented murders which have been committed by abnormal persons out of a conscious or unconscious desire to be put to death by society.[7]

---

[6]See the responses of phychiatrists to a survey on capital punishment reported in Cohen, "Psychiatrists Look at Capital Punishment," 29 Psychiatry Digest 45, 49 (Feb. 1968). The former Chief of Service of the Psychiatric Clinic at Sing Sing Prison concluded that

> "The fallacy here [in the desire for capital punishment] is that the real murderer, in the act of killing, does not think of the consequences. The desire for control or reassurance comes only to the 'average citizen'—. . ."

Statement by Dr. Yves J. Kron, "The Citizen and Capital Punishment" printed by the New York Committee to Abolish Capital Punishment.

[7]West, *supra,* at 3-4; T. Sellin, *The Death Penalty* (1959).

The existence of capital punishment, moveover, represents an official sanction of violence and revenge that cannot help but brutalize societal values. Thus, even if it is rarely exercised, the dealth penalty provides a model that apparently stimulates more homicides than it deters. These considerations prompted the Board of Trustees of the American Psychiatric Association, the oldest continuing national medical society in the United States, with a membership of over 17,000 psychiatrists, to adopt the following resolution on December 12, 1969:

> "Resolved that the American Psychiatric Association, through its Board of Trustees, opposes the death penalty and calls for its abolition. The best available scientific and expert opinion holds it to be anachronistic, brutalizing, ineffective and contrary to progress in penology and forensic psychiatry."

The American Psychiatric Association went on to file a brief amicus curiae before this Court in which various illustrations were given to show how the death penalty, far from serving as a deterrent, ". . . may actually serve as an incitement to crime among various types of mentally unstable potential offenders." Brief for American Psychiatric Association as Amicus Curiae at 6-7, *Maxwell v. Bishop*, 398 U.S. 262 (1970).

Conclusion.

The extreme psychological suffering inherent in capital punishment renders it cruel and unusual punishment. The existence of alternative methods to achieve the stated purposes of capital punishment makes it impossible to

justify in terms of legitimate governmental interests. In fact it probably incites more homicides than it deters. For these reasons, amicus submits that the judgment of the Supreme Court of California should be reversed.

Dated: August 26, 1971.

Respectfully submitted,

DONALD M. WESSLING,
Attorney for Committee of Psychiatrists for Evaluation of the Death Penalty

Of Counsel:
FREDERICK A. RICHMAN.

APPENDIX:

Committee of Psychiatrists for Evaluation of the Death Penalty.

Louis Joylon West, M.D., Chairman
Professor and Head, Department of Psychiatry,
Center for the Health Sciences,
University of California, Los Angeles;
Medical Director,
UCLA Neuropsychiatric Institute.

Ransom J. Arthur, M.D.
Captain, USN(MC);
Director, Naval Neuropsychiatric Research Center, and
Professor of Psychiatry, University of California, San Diego.

Edward F. Auer, M.D.
Professor and Chairman, Department of Psychiatry,
St. Louis University School of Medicine
St. Louis, Missouri.

Eugene Bliss, M.D.
Professor and Chairman, Department of Psychiatry
University of Utah School of Medicine
Salt Lake City, Utah.

Sanford L. Cohen, M.D.
Chairman, Department of Psychiatry,
Boston University School of Medicine
Boston, Massachusetts.

Gordon H. Deckert, M.D.
Professor and Chairman, Department of Psychiatry,
University of Oklahoma School of Medicine,
Oklahoma City, Oklahoma.

Leon Eisenberg, M.D.
Professor and Head, Department of Psychiatry,
Massachusetts General Hospital and Harvard
University School of Medicine, Boston, Massachusetts;
Past President, American Orthopsychiatric Association.

Lloyd C. Elam, M.D.
President, Meharry Medical College and
Professor of Psychiatry, Meharry School of Medicine
Nashville, Tennessee.

Joel Elkes, M.D.
Chairman, Department of Psychiatry and
Behavorial Sciences
Johns Hopkins University Medical School
Baltimore, Maryland.

Daniel X. Freedman, M.D.
Professor and Chairman, Department of Psychiatry,
University of Chicago School of Medicine,
Chicago, Illinois.

Herbert S. Gaskill, M.D.
Professor and Chairman, Department of Psychiatry,
University of Colorado School of Medicine,
Denver, Colorado.

David A. Hamburg, M.D.
Professor and Chairman, Department of Psychiatry,
Stanford University School of Medicine,
Stanford, California.

Donald W. Hastings, M.D.
Professor of Psychiatry,
University of Minnesota Medical School,
Minneapolis, Minnesota.

William Hausman, M.D.
Professor and Chairman, Department of Psychiatry,
University of Minnesota Medical School,
Minneapolis, Minnesota.

David R. Hawkins, M.D.
Professor and Chairman, Department of Psychiatry,
University of Virginia School of Medicine,
Charlottesville, Virginia.

Marc H. Hollender, M.D.
Professor and Chairman, Department of Psychiatry,
Vanderbilt University School of Medicine,
Nashville, Tennessee.

Anthony J. Kales, M.D.
Professor and Chairman, Department of Psychiatry,
Pennsylvania State University School of Medicine,
Hershey, Pennsylvania.

Lawrence C. Kolb, M.D.
Professor and Chairman, Department of Psychiatry,
College of Physicians and Surgeons, Columbia
University,
New York, New York.

Alan I. Levenson, M.D.
Professor and Chairman, Department of Psychiatry,
University of Arizona College of Medicine,
Tucson, Arizona.

William T. Lhamon, M.D.
Professor and Chairman, Department of Psychiatry,
Cornell University Medical College,
New York, New York.

Morris A. Lipton, Ph.D., M.D.
Professor and Head, Department of Psychiatry,
University of North Carolina School of Medicine,
Chapel Hill, North Carolina.

Arnold J. Mandell, M.D.
Professor and Chairman, Department of Psychiatry,
School of Medicine,
University of California at San Diego,
La Jolla, California.

James L. Mathis, M.D.
Professor and Chairman, Department of Psychiatry,
Medical College of Virginia,
Richmond, Virginia.

R. Layton McCurdy, M.D.
Professor and Chairman, Department of Psychiatry,
Medical University of South Carolina,
Charleston, South Carolina.

Roy W. Menninger, M.D.
President, The Menninger Foundation,
Topeka, Kansas.

Milton M. Miller, M.D.
Professor and Chairman, Department of Psychiatry,
University of Wisconsin School of Medicine,
Madison, Wisconsin.

Chester M. Pierce, M.D.
Professor of Education and Psychiatry
Harvard Graduate School of Education
Cambridge, Massachusetts.

Howard P. Rome, M.D.
Professor of Psychiatry, University of Minnesota, and
Head, Psychiatry Section, Mayo Clinic, Rochester,
Minnesota;
Past President, American Psychiatric Association.

Herbert S. Ripley, M.D.
Professor and Chairman, Department of Psychiatry,
University of Washington School of Medicine,
Seattle, Washington.

Albert J. Silverman, M.D.
Professor and Chairman, Department of Psychiatry,
University of Michigan School of Medicine,
Ann Arbor, Michigan.

Alexander Simon, M.D.
Professor and Chairman, Department of Psychiatry,
University of California Medical Center, San Francisco,
California;
Medical Director, Langley Porter Neuropsychiatric
Institute.

Robert L. Stubblefield, M.D.
Professor and Chairman, Department of Psychiatry,
University of Texas Southwestern Medical School,
Dallas Texas.

George Tarjan, M.D.
Professor of Psychiatry,
University of California, Los Angeles;
Secretary, The American Psychiatric Association.

James M. A. Weiss, M.D.
Professor and Chairman, Department of Psychiatry,
University of Missouri School of Medicine,
Columbia, Missouri.

George Winokur, M.D.
Professor and Chairman, Department of Psychiatry,
State University of Iowa School of Medicine,
Iowa City, Iowa.

FILE COPY

Supreme Court, U.S.
FILED
AUG 27 1971
E. ROBERT SEAVER, CLERK

IN THE

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OCTOBER TERM, 1971

No. 68-5027

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Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

MARSHALL J. HARTMAN
American Bar Center
1155 East 60th Street
Chicago, Illinois 60637
(312) 684-2727

Counsel for Amicus Curiae
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

MIDWEST LAW PRINTING CO., CHICAGO 60601. FINANCIAL 6-2908

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On Writ of Certiorari to the Supreme Court of California

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

The National Legal Aid and Defender Association files this brief Amicus Curiae pursuant to the written consent of the parties.

INTEREST OF AMICUS CURIAE.

The National Legal Aid and Defender Association is an organization composed of over 1,000 legal aid and defender offices in America. In addition 3,000 individual members, most of whom are private practioners, are numbered among their ranks. The main concern of the

organization is with the rights of the indigent in our legal and criminal justice systems.

The Defender offices elect a nine man defender committee composed of public defenders from Florida to California to set policy and supervise the Defender component of the organization. On April 28, 1971 the Defender Committee, meeting in New Orleans, unanimously adopted a resolution condemning the use of capital punishment. Among the grounds urged for the abolition of capital punishment was the belief that contemporary standards of human decency had evolved to the point that the death penalty ought to be declared unconstitutional as violative of the cruel and unusual provisions of the eighth amendment.

OPINION BELOW.

The opinion of the California Supreme Court in *People* v. *Aikens* is reported at 70 Adv. Cal. 383, 74 Cal. Rptr. 882, 450 P. 2d 258 (1969).

JURISDICTION.

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. Sec. 1257 (3).

STATUTORY PROVISIONS INVOLVED.

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States. The relevant California statutory provisions are: (1) California Penal Code Sec. 190 and (2) California Penal Code Sec. 190.1.

QUESTION PRESENTED.

Does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?

STATEMENT OF THE CASE.

The National Legal Aid and Defender Association adopts Appellant's Statement.

ARGUMENT.

THE CRUEL AND UNUSUAL CLAUSE OF THE EIGHTH AMENDMENT IS A DYNAMIC CONCEPT WHICH NOW MUST BE APPLIED TO RENDER THE DEATH PENALTY UNCONSTITUTIONAL.

In *Trop* v. *Dulles,* 356 U.S. 86 (1958) this Court held that the Eighth Amendment prohibition against cruel and unusual punishment was a dynamic concept dependent upon the "evolving standards of decency that mark the progress of a maturing society."

Although it is true that at the time of the adoption of the Eighth Amendment capital punishment was practiced in colonial America, our notions of what constitutes cruel and unusual punishment have undergone significant changes.

In *Ex Parte Wilson,* 114 U.S. 417 Mr. Justice Gray noted,

> "What punishment may be considered as infamous may be affected by the changes of opinions from one age to another. In former times, being put in the stocks was not considered as necessarily infamous. . . . But at the present day it might be thought an infamous punishment."

Robinson v. *California,* 370 U.S. 660 held the cruel and unusual clause of the Eighth Amendment applicable to the states. Since that time there has arisen a significant body of law construing that clause and reflecting contemporary notions of what is or is not "cruel and unusual punishment."

These cases make it clear that contemporary standards of human decency have evolved to the point where imposition of the death penalty must now be held to violate the cruel and unusual clause of the Eighth Amendment.

A. PUNISHMENTS LESS SEVERE THAN THE DEATH PENALTY HAVE BEEN HELD CRUEL AND UNUSUAL UNDER THE EIGHTH AMENDMENT.

In *Jackson* v. *Bishop*, 404 F. 2d 571 (1968) Justice Blackmun, writing for the Eighth Circuit Court of Appeals, held that the use of a prison strap as a disciplinary measure in the Arkansas Penitentiary constituted cruel and unusual punishment under the Eighth Amendment.

Reviewing this Court's decisions on the issue, Justice Blackmun stated,

> "In summary then so far as the Supreme Court cases are concerned, we have a flat recognition that the limits of the Eighth Amendment's proscription are not easily or exactly defined, and we also have clear indications that the applicable standards are flexible, that disproportion, both among punishments and between punishment and crime, is a factor to be considered, and that broad and idealistic concepts of dignity, civilized standards, humanity and decency are useful and usable." at 579.

He went on to say that

> "the strap's use, irrespective of any precautionary conditions which may be imposed, offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess; and that it also violates those standards of good conscience and fundamental fairness enunciated by this court. . . ."

Justice Blackmun relied in part on *Jordan* v. *Fitzharris*, 257 F. Supp. 674 (1969), in which the District Court for the Northern District of California had held that conditions of confinement in the California Correctional Training Facility at Soledad constituted cruel and unusual punishment. Those conditions consisted of the prisoner being confined in a small cell 6 feet by 8 feet 4 inches for a period of 12 days in solitary confinement, naked for seven of those days, generally without any light or adequate ventilation, and without implements to clean himself.

Since those cases there have been many others in this area, all concluding that such treatment of prisoners constituted cruel and unusual punishment under the Eighth Amendment. The reasoning employed in the *Fitzharris* case was, first to ask whether under all the circumstances the punishment in question was of such character as to shock general conscience or to be intolerable to fundamental fairness. Secondly the Court noted that a punishment may be cruel and unusual if greatly disproportionate to the offense for which it is imposed. And finally, a punishment may be cruel and unusual when although applied in pursuit of a legitimate penal aim, it goes beyond what is necessary to achieve that aim; that is, when a punishment is unnecessarily cruel in view of the purpose for which it is used. (at p. 679) Accord: see *Wright* v. *McMann*, 321 F. Supp. 127 (1970) (Prisoner confined nude in isolation cell); *Holt* v. *Sarver*, 309 F. Supp. 362 (1970) (General conditions and practices in the Arkansas state prison system); *Lollis* v. *New York State Department of Social Services*, 322 F. Supp. 473 (1970) (Children confined in isolated room in state training schools

with no recreational or reading programs); *Dearman* v. *Woodson*, 429 F. 2d 1288 (1970) (Prisoner not given food for 50½ hours).

There are several conclusions to be drawn from the reasoning of these cases.

The first is that if whipping (*Jackson* v. *Bishop supra*) or even statelessness (*Trop* v. *Dulles supra*) are cruel and unusual punishments within the meaning of the Eighth Amendment, then it follows that the extreme penalty, death, is also cruel and unusual punishment. See Mr. Justice Frankfurter's dissent in *Trop* v. *Dulles, supra* at 125.

The second conclusion that may be drawn from these cases derives from the *Jordan* formula (*Jordan* v. *Fitzharris supra*), where the Court notes that a punishment may be cruel and unusual if it goes beyond what is necessary to achieve a legitimate penal interest. Compare *Workman* v. *Commonwealth*, 429 S.W. 2d 374, 378 (1968).

That brings us to the question of the purpose for which the death penalty is designed and whether the imposition of the death penalty is necessary for that purpose.

Modern penology rejects the doctrine of vengeance. Its goals in this day and age are rehabilitation and deterrence. There is no question but that the death penalty does not rehabilitate the offender, and so the remaining question is that of deterrence.

On that score Dr. Hugo Bedau points out in his most recent article on the Death Penalty that the majority report of the Special Commission of the Massachusetts Legislature To Investigate The Effectiveness of Capital Punishment as a Deterrent to Crime concluded in its in-

terim report of October 1968 that "the death penalty is not a deterrent to crime." Bedau, *The Death Penalty in America, Review & Forecast* XXXV Federal Probation 32, 35 (June, 1971). See also H. Mattick, *The Unexamined Death*, 7-9, 31 (1963).

Bedau goes on to add that

> ". . . the belief that the death penalty is no deterrent, or (what is more to the point) that it is no better a deterrent than imprisonment has become a commonplace of contemporary criminology." *supra* at 36.

If death is no more a deterrent than imprisonment, then imposition of the death penalty fails to meet the rationality test suggested by *Jordan* v. *Fitzharris* that punishment is unnecessarily cruel if it goes beyond what is necessary to achieve its proper penal purpose. Compare the rational connection test in *Tot* v. *U. S.*, 319 U.S. 463, 467.

The death penalty is unnecessary to achieve the proper penal purposes of rehabilitation and protection of society. Therefore, it constitutes cruel and unusual punishment within the meaning of the Eighth Amendment.

B. THE INCIDENCE OF THE DEATH PENALTY RENDERS IT CRUEL AND UNUSUAL.

There were 13,650 homicides recorded in the United States in 1968. *Uniform Crime Reports* at 6 (1969). In that same year 102 defendants received the death penalty, 96 of whom were charged with murder. *45 National Prisoner Statistics* at 1 (1969).

According to J. Edgar Hoover, Director of the F.B.I., 86% of the criminal homicides occurring in 1968 were

lved. *Uniform Crime Reports* at 9 (1969). Thus out of e 11,739 cases allegedly solved, less than 1% of the fendants were given the death penalty.

Such incidence in application of the death penalty nders it unusual to say the least and cruel in its ap- ication.

Moreover, those upon whom it falls are often the or, the black, and the unpopular. See *The Challenge Crime in a Free Society*, at 143.

In addition, it is suggested that those who plead guilty e less likely to receive the death penalty than those o demand trial. Doesn't it seem anomalous to kill se whom we merely suspect are guilty, while those o we *know* are guilty escape the ultimate penalty?

Finally, it should be noted that in some states such Illinois, the jury is not requested to return a death tence in every homicide. In that state unless the prose- or qualifies the jury, submits a death penalty verdict, l asks for the death penalty, the jury will never re- n a death verdict. Such unbridled prosecutorial dis- tion as to which man shall live and which man shall the risk of death, is another factor that leads to the id conclusion that the death penalty is reserved for black, the poor, the friendless, and the unpopular.

POLICY CONSIDERATIONS — THE EFFECT OF THE DEATH PENALTY UPON OTHER ASPECTS OF THE CRIMINAL JUSTICE SYSTEM.

he Death Penalty does not only constitute cruel and sual punishment to those upon whom it is imposed on the entire criminal justice system as well. Hugo

Bedau points out that from 1960 to 1970 the average time for prisoners under sentence of death increased from 14.4 months to 32.6 months. *Bedau supra* at 33.

During this time the courts are clogged with petitions, direct appeals, collateral attacks, post conviction remedies, federal habeas corpus, etc. ad infinitum. Since informed sources estimate that over 90% of the inmates now on death row require court-appointed counsel or public defenders, the concomitant time on these cases required of attorneys is time taken away from other cases which must then be deferred and continuances sought. This places a strain on already overburdened and understaffed defender and assigned counsel systems. Thus the death penalty cases have a multiplier effect on the criminal legal system far in excess of their numbers.

Moreover, authorities such as Professor Inbau of Northwestern Law School have noted the deleterious effect death penalty cases have on the law in general. Juries compromise on verdicts to avoid inflicting the death penalty. Reviewing courts embark upon a "quest for error" "for the purpose of finding some excuse to reverse the conviction of a person sentenced to death. In doing so, rules of law are developed which plague the prosecution in its efforts in non-capital cases. . . ." *Criminal Justice Cases and Comments,* Inbau, Thompson and Sowle 1969 Vol. 1 Ch. 5 at 448.

This position is supported by the President's Commission on Law Enforcement and Administration of Justice, which noted that the death penalty "clearly has an undesirable effect on the administration of criminal justice." *The Challenge of Crime in a Free Society* at 143.

Swift justice has been characterized as the best deterrent to crime. When the courts are clogged with death cases and decisions are made contrary to the best interests of prosecutors attempting to convict non-capital defendants, perhaps a balancing of interests requires an end to capital cases to insure the real goal of the criminal justice system, a speedy and fair disposition of cases and the prevention of future crime.

CONCLUSION.

For the above and foregoing several reasons, the Amicus Curiae National Legal Aid & Defender Association urges this Honorable Court as the ultimate keeper of society's conscience under the evolving standards of decency to declare that the death penalty is cruel and unusual punishment proscribed by the Eighth Amendment.

Respectfully submitted,

MARSHALL J. HARTMAN
American Bar Center
1155 East 60th Street
Chicago, Illinois 60637
(312) 684-2727

Counsel for Amicus Curiae
NATIONAL LEGAL AID AND
DEFENDER ASSOCIATION

August 25, 1971

FILE COPY

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E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

No. 68-5027

EARNEST JAMES AIKENS, JR., *Petitioner,*

v.

CALIFORNIA, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR PETITIONER

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
JACK HIMMELSTEIN
ELIZABETH B. DUBOIS
JEFFRY A. MINTZ
ELAINE R. JONES
LYNN WALKER
ANN WAGNER

10 Columbus Circle,
Suite 2030
New York, N.Y. 10019

JERRY A. GREEN

273 Page Street
San Francisco, Calif. 94109

JEROME B. FALK, JR.

650 California Street
Room 2920
San Francisco, California 94108

PAUL N. HALVONIK

593 Market Street
San Francisco, California 94108

MICHAEL MELTSNER

Columbia University Law School
435 West 116th Street
New York, New York 10027

ANTHONY G. AMSTERDAM

Stanford University Law School
Stanford, California 94305

Attorneys for Petitioner

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IN THE

Supreme Court of the United States

No. 68-5027

EARNEST JAMES AIKENS, JR., *Petitioner,*

v.

CALIFORNIA, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of California affirming petitioner's conviction of first degree murder and sentence of death by lethal gas is reported at 70 Cal.2d 369, 450 P.2d 258, 74 Cal. Rptr. 882. The oral opinions of the Superior Court of Ventura County finding petitioner guilty and sentencing him to die are unreported, and appear in the trial transcript at Tr. 3372-3419 and 4980-4992.[1]

[1]Respondent has filed a motion, with petitioner's acquiescence, requesting that the Court consider this case upon the original record and dispense with the printing of an Appendix. Petitioner's brief is required to be filed before the motion can be decided. We therefore refer to the documents as paginated in the original record.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. §1257 (3), the petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the Supreme Court of California was entered on February 18, 1969. Pursuant to Rule 22(1) of this Court, Mr. Justice Douglas extended the time for filing a petition for *certiorari* until May 30, 1969; and the petition was filed on May 29, 1969.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

It involves the Due Process Clause of the Fourteenth Amendment.

It further involves Cal. Penal Code §§ 187, 188, 189, 190, 190.1, 3604 and 3605, which are set forth in Appendix A to this brief [hereafter cited as App. A, pp. ____ *infra*], at App. A, pp. 1a-3a *infra*.[2]

QUESTION PRESENTED

Does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?

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[2] Following the date of petitioner's conviction and sentence, two provisions of the California murder statutes were amended in particulars not here relevant. The present form of the provisions is also set forth in the same appendix, App. A, pp. 3a-4a, *infra*.

STATEMENT OF THE CASE

Following a bench trial in the Superior Court of Ventura County, petitioner Earnest James Aikens, Jr., was convicted of the first-degree murder of Mrs. Mary Winifred Eaton, on April 26, 1965, and was sentenced to die for that offense. In consolidated proceedings, he was at the same time convicted of the first-degree murder of Mrs. Kathleen Nell Dodd on April 3, 1962, and sentenced to life imprisonment pursuant to Cal. Penal Code §190.1,[3] which prohibits the imposition of the death penalty upon any person who was under the age of eighteen when the murder was committed. Petitioner was not quite seventeen when Mrs. Dodd was murdered, and was twenty at the time of the murder of Mrs. Eaton.

Both of these killings were unmitigated atrocities, committed during robberies and rapes of the victims after the killer had entered their homes. Although not overwhelming, the circumstantial evidence presented by the prosecution was sufficient to identify petitioner as the killer. In the penalty trial that followed his conviction of Mrs. Eaton's murder,[4] the prosecution also showed that petitioner had committed a third first-degree murder on June 7, 1962 and a forcible rape on December 25, 1962. The trial court found that:

> "Earnest Aikens has since the age of eleven years of age, or thereabouts, been involved in an almost continuous pattern of anti-social and criminal behavior of one sort or another. He has graduated from petty and minor nuisances and offenses through more serious proceedings that have involved Juvenile Court wardship and a commitment to Los Prietos Boys' School and to more recent commitments at

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[3] App. A, pp. 2a-3a *infra.*

[4] This Court is familiar with the two-stage procedure provided by California law for the trial of capital cases. See *McGautha v. California,* 402 U.S. 183 (1971).

> the Preston School of Industry and the Youth Training School, both administered by the California Youth Authority. In the instances of his parole from the Authority level, his periods of surcease from criminal behavior have been of short duration. Now he stands convicted of two brutal, cold-blooded and vicious killings, together with the finding that I have here earlier made of his responsibility for a third homicide. Interspersed with the foregoing have been instances of assault, rape and robbery. Such record, at the very least, demonstrated an indifferent, arrogant and obvious disregard for the dignity and value of human life and the rights of others." (Tr. 4987)

The court credited psychiatric findings that petitioner was a sociopath (Tr. 4987-4989); found that he had not benefited from rehabilitative efforts in the past (Tr. 4988, 4991) and was not very likely to benefit from them in the future (Tr. 4988-4989);[5] found that his criminal behavior was not substantially explained or mitigated by his upbringing in a fatherless and economically deprived family (Tr. 4989-4991), but was attributable to his failure to use those opportunities that society had given him for a free education and later for institutional rehabilitation (Tr. 4990-4991); and, in view of his "multiple and aggravated crimes . . . against the victims . . . involved and, indeed, against society in general" (Tr. 4992), concluded that he should be put to death (*ibid*).

Petitioner's crimes were indeed aggravated. Mrs. Eaton was a woman in her sixties, the mother of an acquaintance of petitioner's. While she was home alone in the middle of the day, her house was entered; her money and a sharp knife from her kitchen were taken; she was led to a bedroom; her arms were tied behind her with two belts; and she was then raped and killed by several wounds of the

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[5] Although this last conclusion is expressed in terms of the views of the psychiatrists, it appears that the court was itself of the same view.

knife that plainly establish a deliberate and intentional murder.

Mrs. Dodd was twenty-five years old and five months pregnant when she was killed. Her house was entered in the late evening, while her husband was away and her two young children were sleeping. She ran or was taken from the house to a railroad embankment in the area, where she was raped. She then ran from the embankment, was overtaken in a neighbor's driveway, and was killed by numerous stabs of a knife that had been removed from her kitchen. Money was also removed from Mrs. Dodd's house.

A more detailed statement of the evidence relating to the killings of Mrs. Eaton and Mrs. Dodd is set forth in Appendix B to this brief. We do not place it here because it is lengthy and is not material to our constitutional submission in this Court. Our submission is that the penalty of death is a cruel and unusual punishment for the crime of first-degree murder—or for any other civilian, peacetime crime—no matter how aggravated. We make no claim that if the death penalty can constitutionally be inflicted for any such crime, it cannot be inflicted upon this petitioner.

His were ghastly crimes—as any intentional killing of a human being is a ghastly crime—and were attended by aggravating features that must necessarily arouse the deepest human instincts of loathing and repugnance. But the issue before this Court cannot turn upon those features. This is so because if the state may constitutionally punish petitioner's crimes with death, it may also constitutionally use death to punish murders unattended by the same features. California's statutes and its courts in fact do so; and we can conceive no Eighth Amendment principle which, allowing death punishment in the particular circumstances of this case, could confine it to them. *Cf. Furman v. Georgia,* O.T. 1971, No. 69-5003.

HOW THE CONSTITUTIONAL QUESTION WAS PRESENTED AND DECIDED BELOW

California's automatic appeal statute in death penalty cases (Cal. Penal Code § 1239) imposes upon the California Supreme Court an obligation to consider all legal errors appearing in the record of a capital case. *E.g., People v. Stanworth,* 71 Cal.2d 820, 457 P.2d 889, 80 Cal. Rptr. 49 (1969); *People v. Robinson,* 61 Cal.2d 373, 388 n. 14, 392 P.2d 970, 979 n. 14, 38 Cal. Rptr. 890, 899 n. 14 (1964). Pursuant to that obligation, the Supreme Court here sustained the constitutionality of the death penalty, 70 Cal. 2d at 380, 450 P.2d, at 265, 74 Cal. Rptr., at 889, under authority of *In re Anderson,* 69 Cal.2d 613, 447 P.2d 117, 73 Cal. Rptr. 21 (1968), which had rejected the claim that it was a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments.

SUMMARY OF ARGUMENT

The penalty of death for first-degree murder is a cruel and unusual punishment because it affronts the basic standards of decency of contemporary society. Those standards are manifested by a number of objective indicators which this Court can properly notice, but principally by the extreme rarity of actual infliction of the death penalty in the United States and the world today. Worldwide and national abandonment of the use of capital punishment during this century has accelerated dramatically, and has now become nearly total.

In historical context, this development marks an overwhelming repudiation of the death penalty as an atavistic barbarism. The penalty remains on the statute books only to be—and because it is—rarely and unusually inflicted. So inflicted, it is not a part of the regular machinery of the state for the control of crime and punishment of criminals. It is an extreme and mindless act of savagery, practiced upon an outcast few. This is exactly the evil against which the Eighth Amendment stands.

If the death penalty is declared unconstitutional, "[t]he State thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal."[6] In the debates upon the Murder (Abolition of Death Penalty) Bill of 1965, Lord Chancellor Gardiner made the basic point of our argument. "When we abolished the punishment for treason that you should be hanged, and then cut down while still alive, and then disembowelled while still alive, and then quartered, we did not abolish that punishment because we sympathised with traitors, but because we took the view that it was a punishment no longer consistent with our self-respect."[7] Today the death penalty in any form is inconsistent with the self-respect of a civilized people. It is therefore prohibited by the Eighth and Fourteenth Amendments.

ARGUMENT

I. INTRODUCTION

This case presents the question whether the infliction of the penalty of death for the crime of murder, in the form in which the death penalty is administered in California and throughout the United States in this third quarter of the twentieth century, is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. That question is, we think, an open one, uncontrolled by any prior decision of this Court. For while the Court has several times assumed, and expressed in *dicta*, that "the mere extinguishment of life"[8] is not a constitutionally prohibited cruel and unusual punishment, it has never focused squarely

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[6] *Weems v. United States*, 217 U.S. 349, 381 (1910).

[7] 268 HANSARD, PARLIAMENTARY DEBATES (5th series) (Lords, 43d Parl., 1st Sess., 1964-1965), 703 (1965).

[8] *In re Kemmler*, 136 U.S. 436, 447 (1890) (dictum).

upon that issue or given it the consideration warranted by a major question arising under the Bill of Rights, particularly a question upon which hundreds of human lives depend.[9]

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[9] Analysis of this Court's prior decisions relative to capital punishment demonstrates the correctness of the conclusion recently reached by the Court of Appeals for the Fourth Circuit, that "[t]he Court has never held directly that the death penalty is or is not cruel and unusual punishment." *Ralph v. Warden*, 438 F.2d 786, 789 (4th Cir. 1970).

In *Wilkerson v. Utah*, 99 U.S. 130 (1879), no constitutional contention was raised on behalf of the condemned man. *Id.* at 136-137. The issue presented was whether, in the absence of express statutory provision, execution of a death sentence by the method of shooting was legally authorized. The Court held that it was; and assuming what was not questioned by Wilkerson's counsel--that the death sentence itself was permissible--the Court expressed the view that shooting was not a cruel and unusual method of inflicting it. *Id.* at 134-136.

The cruelty of various methods of inflicting capital punishment was also the question sought to be raised in *In re Kemmler*, 136 U.S. 436 (1890) (electrocution); *McElvaine v. Brush*, 142 U.S. 155 (1891) (solitary confinement preceding execution; and *State ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (second electrocution after first failed for mechanical reasons). The *Kemmler* and *McElvaine* cases were decided upon the express ground that the Eighth Amendment did not restrict the States (136 U.S. at 447-449; 142 U.S. at 158-159), a view that prevailed in this Court well into the twentieth century. *Pervear v. Massachusetts*, 5 Wall. (72 U.S.) 475, 479-480 (1867); *O'Neil v. Vermont*, 144 U.S. 323, 331-332 (1892) (dictum); *Collins v. Johnston*, 237 U.S. 502, 510-511 (1915). Mr. Justice Frankfurter's decisive vote in *Francis* was cast on the same grounds. (329 U.S. at 466, 469-470.) Thus, the Court's expressed approval of the death penalty in the first two cases was *dictum;* in the third, it was non-dispositive; and in all three cases it was directed merely at the mode of execution of a death sentence whose basic constitutionality was neither argued nor attentively considered.

We shall return shortly to the approval of the death penalty in *Trop v. Dulles*, 356 U.S. 86, 99 (1958) (plurality opinion of Chief Justice Warren). See pp. 26-27, *infra*. That too was, of course, *dictum*, since no death sentence was at issue in *Trop*. And the general pronouncement that the petitioner in *Williams v. Oklahoma*, 358 U.S. 576 (1959), was not denied "due process of law or any other constitutional right" (*id.* at 586-587), hardly speaks to the Eighth Amendment, which was

We make this point at the outset for two reasons. It is, of course, important that our Eighth Amendment contention against the death penalty does not ask the Court to "depart from . . . firmly established principle," *Abbate v. United States*, 359 U.S. 187, 195 (1959), or to overturn any "deliberately decided rule of Constitutional law," *Mapp v. Ohio*, 367 U.S. 643, 677 (1961) (Mr. Justice Harlan, dissenting). To the contrary, the way is perfectly clear for the Court to hold that the death penalty is a cruel and unusual punishment consistently with the proper application of principles of *stare decisis* in constitutional adjudication. But the matter goes further than that. In a very practical as well as a jurisprudential sense, the Eighth Amendment question raised requires a judgment of first impression from this Court.

In saying so, we do not naively suggest that the Court's prior opinions treat the constitutionality of capital punishment as debatable. Obviously, the Court has long and firmly supposed its constitutionality; and if the question had been appropriately posed in *Wilkerson*[10] or *Kemmler*,[11] capital punishment plainly would have been sustained. The same may be true as late as *Francis*,[12] or even *Trop*,[13] although it is difficult to speculate what the Court would have concluded if a square presentation of the Eighth Amendment question had directed its attention to the enormous and constitutionally significant changes which the

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not invoked by Williams. *See also Williams v. New York*, 337 U.S. 241 (1949). In summary, no discussion of the constitutionality of capital punishment under the Eighth Amendment has ever been made by this Court under the circumstances of focused responsibility and consideration which entitle constitutional decisions to precedential weight. *See, e.g., Williams v. Florida*, 399 U.S. 78, 90-92 (1970).

[10] *Wilkerson v. Utah*, 99 U.S. 130 (1879), note 9 *supra*.

[11] *In re Kemmler*, 136 U.S. 436 (1890), note 9 *supra*.

[12] *State ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), note 9, *supra*.

[13] *Trop v. Dulles*, 356 U.S. 86 (1958), note 9, *supra*.

institution of capital punishment had already undergone between the late nineteenth century and 1947 or 1958. Still further changes have occurred since 1958; and the issue of the constitutionality of capital punishment today is an altogether different issue than its validity a century ago. Because the Court has not directly confronted the issue during this century, it has not had occasion to consider the constitutional consequences of the century's changes; and it is for this reason that the Eighth Amendment question presented in 1971 must fairly be viewed afresh, unconstrained by assumptions of the death penalty's validity which the Court first made in 1879 and continued to make—without examination—twenty or a dozen years ago.

What has happened, during the century, is an overwhelming, accelerating, nation-wide and world-wide abandonment of death as a punishment for civilian crime.[14] We shall shortly discuss the precise constitutional implications of that evolution;[15] but, upon any view, it is relevant to, and will ultimately be decisive of, the constitutionality of capital punishment under the Eighth Amendment. Capital punishment has largely gone the way of flogging and banishment, progressively excluded by this Nation and by the civilized nations of men from the register of legitimate penal sanctions. Like flogging and banishment, capital punishment is condemned by history and will sooner or later be condemned by this Court under the Constitution. The question is whether that condemnation should come sooner or later. It is whether the evolution of civility that is inexorably rendering the death penalty intolerable has so far advanced as to make the Eighth Amendment take hold upon this doomed deadly institution; or whether the United States—following a period of more than four years since June 2, 1967 without an execution—must now relapse into killing some or all

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[14] See pp. 27-39, *infra*.

[15] See pp. 39-61, *infra*.

of the more than 660 men on its death rows before that evolution reaches the stage at which their killings are established to be unconstitutional.

We put the issue in this way not because we enjoy the presumptuous exercise of predicting history and the future outcome of this Court's decisions but because, inescapably, that *is* the issue. No one can dispute, we believe, either the fact of the evolution we describe or the legal consequence that, at some point in its development, that evolution must call into play the Cruel and Unusual Punishment Clause of the Eighth Amendment. It must, for the same reasons that a similar evolution has brought flogging[16] and banishment[17] under the Eighth Amendment's ban. The questions then arise: What principles should this Court use to determine the course of historical development, and the point upon that course, which mark a progressively repudiated punishment as cruel and unusual for Eighth Amendment purposes? And with regard to capital punishment, has that course been followed and that point been reached?

These questions are not without difficulty because, as has frequently been noted, the Eighth Amendment itself is not without difficulty.[18] The Court's decisions have not undertaken to define in comprehensive terms the concept of "cruel and unusual punishments."[19] Different approaches

[16] *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968).

[17] *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (plurality opinion of Chief Justice Warren); *Dear Wing Jung v. United States*, 312 F.2d 73, 75-76 (9th Cir. 1962).

[18] *Wilkerson v. Utah*, 99 U.S. 130, 135-136 (1879); *In re Kemmler*, 136 U.S. 436, 447 (1890); *Weems v. United States*, 217 U.S. 349, 370, 375 (1910); *Jackson v. Bishop*, 404 F.2d 571, 577 (8th Cir. 1968); *Ralph v. Warden*, 438 F.2d 786, 789 (4th Cir. 1970).

[19] *Weems v. United States*, 217 U.S. 349, 368-369 (1910); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion of Chief Justice Warren); Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U.L. REV. 846 (1961); Note, *Revival of the Eighth Amendment: Development of*

to that concept are available which would bring the death penalty within its prohibition. The approach taken in this brief is narrower than others that have been persuasively argued.[20] Our approach concentrates upon the particular characteristic of capital punishment that it shares with only a very few other punishments, notably flogging and banishment which have already been constitutionally forbidden.

That characteristic is extreme contemporary rarity resulting from a demonstrable historical movement which can only be interpreted fairly as a mounting and today virtually universal repudiation. Today, "[d]eath is the rarest of all punishments for crime."[21] So far has its repudiation advanced that, if the United States were in fact to execute its 660 condemned men in 1971, it would thereby become uncontestably the greatest killer of human beings by judicial process in the world—probably, the killer of more men than all other non-communist nations of the world combined.[22] This observation speaks strongly to the question

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Cruel-Punishment Doctrine by the Supreme Court, 16 STAN. L. R. 996 (1964); Recent Decision, 5 U. RICHMOND L. REV. 392, 3 (1971).

[20]Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970); Gottlieb, *Testing the Death Penalty*, 34 SO. CALIF. L. REV. 268 (1961); Bedau, *The Courts, The Constitution, and Capital Punishment*, [1968] UTAH L. REV. 201; Comment, *The Death Penalty Cases*, 56 CALIF. L. REV. 126 (1968).

[21]Sellin, *The Inevitable End of Capital Punishment*, in SELLIN, CAPITAL PUNISHMENT (1967) [hereafter cited as SELLIN (1967)] 239.

[22]Virtually no information is available concerning executions in communist countries. Patrick reports an average of 535.3 executions per year between 1958 and 1962 in the 89 countries using the death penalty for which he could obtain data. Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. CRIM. L., CRIM. & P. SCI. 397, 408 (1965). After subtraction of the 48.6 annual executions that Patrick reports for the United States during this period (*id.* at 404), the remaining 88 countries conducted 486.7 executions annually. They include all of the major death penalty countries of the world except the communist nations and the following: Burma, Haiti, Ind

whether death is a cruel and unusual punishment within the meaning of the Constitution of a Nation which aspires to be one of the world's more enlightened peoples.

But our approach to the Eighth Amendment concentrates primarily upon the evolution of the death penalty in the United States itself. Properly viewed, that evolution has brought this country to a stage at which the relevant constitutional indicators of a cruel and unusual punishment have abundantly matured. America has had its time of "experimentation"[23] with the killing of men; the experiment has led to one inexorable conclusion; and further development can only make more manifest—at a terrible cost—what is already manifest and manifestly fitting as a basis for judicial application of the Constitution. To demonstrate why this is so, we first discuss the nature of the Eighth Amendment's concern against cruel and unusual punishments, and then proceed to test the death penalty in light of that concern.

II. THE RELEVANT EIGHTH AMENDMENT STANDARD

At the heart of the Eighth Amendment[24] lurks an extraordinary dilemma whose resolution is, we think, the key to decision of this case. The dilemma arises from the confrontation of three basic principles.

Iran, Mali, Mexico (29 of whose 32 jurisdictions have legally abolished the death penalty), Nicaragua, Pakistan, Sierra Leone, Sudan and the Republic of Viet Nam. These latter countries would therefore have to account for more than a quarter of the executions in the non-communist world in order to bring the non-communist total, exclusive of the United States, to 660 according to Patrick's figures. And Patrick's figures appear to be unduly high. See note 51, *infra*.

[23] *See Powell v. Texas*, 392 U.S. 514, 536-537 (1968) (plurality opinion of Mr. Justice Marshall); *Williams v. Florida*, 399 U.S. 78, 138 (1970) (separate opinion of Mr. Justice Harlan).

[24] The Cruel and Unusual Punishment Clause of the Eighth Amendment is made applicable to the States through the Due Process Clause of the Fourteenth. *Robinson v. California*, 370 U.S. 660 (1962), so holds; and there can be little doubt that this Bill of Rights guarantee,

First, in the context of American government, the Eighth Amendment's proscription of cruel and unusual punishments forbids the legislative enactment of such punishments as well as the judicial imposition of them. This has always been accepted. *Weems v. United States,* 217 U.S. 349, 366, 378-379, 382 (1910); *Trop v. Dulles,* 356 U.S. 86, 103-104 (1958) (plurality opinion of Chief Justice Warren); *Robinson v. California,* 370 U.S. 660 (1962); and see *Wilkerson v. Utah,* 99 U.S. 130, 133, 136-137 (1879) (dictum); *In re Kemmler,* 136 U.S. 436, 446-447 (1890) (dictum).

Second, the force of the Amendment is not limited to the prohibition of those atrocities that would have turned the stomachs of the Framers in the Eighteenth Century.[25]

whose "basic concept . . . is nothing less than the dignity of man," *Trop v. Dulles,* 356 U.S. 86, 100 (1958) (plurality opinion of Chief Justice Warren), satisfies the most restrictive test for adoption as a measure of due process. Its derivation from times anterior to Magna Carta (see Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning,* 57 CALIF. L. REV. 839, 845-846 (1969)) through the Bill of Rights of 1689 (1 Wm. & Mary, sess. 2, ch. 2, preamble, clause 10) amply establishes that it is a "'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Palko v. Connecticut,* 302 U.S. 319; 325 (1937). The point did not escape Patrick Henry in 1788. "What has distinguished our ancestors?–That they would not admit of tortures, or cruel and barbarous punishment." 3 ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1863), 447.

For convenience, we shall speak simply of the Eighth Amendment throughout this brief, meaning thereby the Cruel and Unusual Punishment Clause as it measures the liberty protected by the Due Process Clause of the Fourteenth Amendment.

[25]Certainly the Eighth Amendment does bar those atrocities, but they mark only the core of minimum content of its prohibition. This is what was meant in *Wilkerson v. Utah,* 99 U.S. 130, 136 (1879), by the observation that, although the exact extent of the Cruel and Unusual Punishment Clause is difficult of definition, "it is safe to affirm that punishments of torture . . . , and all others in the same line of unnecessary cruelty, are forbidden." *Wilkerson* does not suggest, as the *Weems* dissent seems to imply, that torture is the outer limit of the Amendment. *Weems v. United States,* 217 U.S. 349, 400-401

This conclusion is compelled by both authority and reason. "[I]t is a constitution we are expounding,"[26] and the Constitution "states or ought to state not rules for the passing hour, but principles for an expanding future."[27] Thus, *Trop v. Dulles*, 356 U.S. 86 (1958), outlawed the hoary penalty of banishment with the observations that the scope of the Cruel and Unusual Punishment Clause "is not static," and that the "Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Id.*, at 101 (plurality opinion of Chief Justice Warren).) See also *Robinson v. California*, 370 U.S. 660, 666 (1962) (referring to "the light of contemporary human knowledge"); *Jackson v. Bishop*, 404 F.2d 571, 578-580 (8th Cir. 1968); *Goss v. Bomar*, 337 F.2d 341, 342-343 (6th Cir. 1964) (*dictum*). Such a conception of evolving standards is a constitutional commonplace,[28] and is firmly

(1910) (Mr. Justice White, dissenting). Nor could the Amendment be so limited for the reasons stated convincingly by the majority in *Weems:*

> "... [S]urely [the Framers] ... intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. Surely, their jealousy of power had a saner justification than that. They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation.... [I]f we are to attribute an intelligent providence to [the Eighth Amendment's] ... advocates we cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked." (*Id.* at 372-373.)

[26] *M'Culloch v. Maryland*, 4 Wheat. 316, 407 (1819).

[27] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921), 83.

[28] E.g., *Brown v. Board of Education*, 347 U.S. 483, 492-493 (1954) ("In approaching this problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted ...."); *Ex parte Wilson*, 114 U.S. 417, 427-428 (1885) ("What punishments shall be considered as infamous [for purposes of the Fifth Amendment's indictment

entrenched in the jurisprudence of the Eighth Amendment in particular. The Cruel and Unusual Punishment Clause

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requirement] may be affected by the changes of public opinion from one age to another.") Reference was made to *Wilson* and to *Mackin v. United States*, 117 U.S. 348, 351 (1886), in *Weems v. United States*, 217 U.S. 349, 378 (1910), which canvassed the subject in this frequently quoted passage:

> "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction. There is an example of this in *Cummings v. State of Missouri*, 4 Wall. 277, where the prohibition against *ex post facto* laws was given a more extensive application than what a minority of this court thought had been given in *Calder v. Bull*, 3 Dall. 386. See also *Ex parte Garland*, 4 Wall. 333. The construction of the 14th Amendment is also an example, for it is one of the limitations of the Constitution. In a not unthoughtful opinion Mr. Justice Miller expressed great doubt whether that Amendment would ever be held as being directed against any action of a State which did not discriminate 'against the negroes as a class, or on account of their race.' *Slaughterhouse Cases*, 16 Wall. 36, 81. To what extent the Amendment has expanded beyond that limitation need not be instanced.
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> "There are many illustrations of resistance to narrow constructions of the grants of power to the National Government. One only need be noticed, and we select it because it was made against a power which more than any other is kept present to our minds in visible and effective action. We mean

"may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States,* 217 U.S. 349, 378 (1910).

To deny this dynamic character to the Eighth Amendment would produce inconceivable results. Appendix C to this brief sets forth some of the punishments legally in force and commonly in use in this country during the period when the Cruel and Unusual Punishment Clause was written and adopted. If 1791 is indeed the constitutional benchmark and if the Constitution does not forbid capital punishment today upon the theory that it was widely allowed by law and practice in 1791, then the Eighth Amendment also does not forbid today—and will never forbid—the stocks and the pillory, public flogging, lashing and whipping on the bare body,[29] branding of cheeks and forehead with a hot

> the power over interstate commerce. This power was deduced from the eleven simple words, 'to regulate commerce with foreign nations and among the several States.' The judgment which established it was pronounced by Chief Justice Marshall (*Gibbons v. Ogden*), and reversed a judgment of Chancellor Kent, justified, as that celebrated jurist supposed, by a legislative practice of fourteen years and fortified by the opinions of men familiar with the discussions which had attended the adoption of the Constitution. Persuaded by such considerations the learned chancellor confidently decided that the Congressional power related to 'external, not to internal, commerce,' and adjudged that under an act of the State of New York, Livingston and Fulton had the exclusive right of using steamboats upon all of the navigable waters of the State. The strength of the reasoning was not underrated. It was supported, it was said, 'by great names, by names which have all the titles to consideration that virtue, intelligence and office can bestow.' The narrow construction, however, did not prevail, and the propriety of the arguments upon which it was based was questioned. It was said, in effect, that they supported a construction which ' would cripple the government and render it unequal to the objects for which it was declared to be instituted, and to which the powers given, as fairly understood, render it competent'. . . ." (*Id.* at 373-375.)

[29]Whipping was not thought to be a particularly serious punishment in the late eighteenth century. "[B]y the first Judiciary Act of the United States, whipping was classed with moderate fines and short

iron, and the slitting, cropping, nailing and cutting off of ears. Further discussion of a "static" theory of the Eighth Amendment seems unnecessary.[30]

Third, in applying the Eighth Amendment to advancing and changing times, the courts are to be guided by the touchstone of "contemporary human knowledge,"[31] "public opinion . . . enlightened by a humane justice,"[32] and "the evolving standards of decency that mark the progress of a maturing society."[33] What other standards, after all, could possibly be used? Surely it was not the purpose of the Eighth Amendment that succeeding generations of judges should mirror in it their own, individual philosophies of the criminal sanction. So, if the obsolete and eldritch customs of 1791 are not to be perpetually controlling, where else may judges look but to enlightened public opinion for conception of the "cruel and unusual punishments" which the Constitution forbids?

And there stands the dilemma. Quite perceptibly, an extreme difficulty must attend any process of constitutional adjudication by which this Court subjects legislation to the

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terms of imprisonment in limiting the criminal jurisdiction of the District Courts to cases 'where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted.' Act of September 24, 1789, chap. 20, § 9; 1 Stat. at L., 77." *Ex parte Wilson*, 114 U.S. 417, 427-428 (1885).

[30]The argument has sometimes been advanced that the Eighth Amendment cannot forbid capital punishment consistently with the indictment clause of the Fifth, which speaks of (and, so the argument goes, constitutionalizes) "capital . . . crime." This reasoning, like the static theory of the Eighth Amendment generally, proves too much. For the double jeopardy clause of the constitution also speaks of "jeopardy of life *or limb*." (Emphasis added.)

[31]*Robinson v. California*, 370 U.S. 660, 666 (1962).

[32]*Weems v. United States*, 217 U.S. 349, 378 (1910).

[33]*Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion of Chief Justice Warren).

test of "enlightened public opinion," and adjudges the validity of a legislature's product according to society's "standards of decency." For, both in constitutional contemplation and in fact, it is the legislature, not the Court, which responds to public opinion and immediately reflects the society's standards of decency. If the question asked by the Eighth Amendment really be whether our democratic society can tolerate the existence of any particular penal law that is on the books, the Eighth Amendment's answer will always be that it can—and for the simple reason that the law is on the books of a democratic society.[34] The conclusion therefore seems to be required either that the Eighth Amendment is *not* a judicially enforceable restriction upon legislation;[35] or that the *Weems-Trop* test referring to contemporary public standards of decency is not a usable measure of the Amendment; or else that the question which we have just posed is not the proper question to which the Amendment and the *Weems-Trop* test respond.

As this way of putting the matter suggests, we think that the question—whether the maintenance of a particular harsh penalty on the statute books is consistent with prevailing standards of decency—is the wrong question. We suggest what we think is the right one below. For we cannot believe that the Eighth Amendment is not a restriction upon

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[34]Mr. Justice Story therefore wrote that the Eighth Amendment "would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct" as the Amendment forbids. 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (4th ed. 1873), 623. This observation has undoubted merit with regard to penal laws that are generally and uniformly enforced, but it is inapplicable to selectively and rarely enforced punishments. Precisely in regard to such "cruel *and unusual* punishments," the Amendment is most necessary.

[35]See *State v. Cannon*, 55 Del. 585, 190 A.2d 514 (1963), sustaining the punishment of whipping in an opinion which effectively denies any judicial review of legislation under the Cruel and Unusual Punishment Clause.

cruel and unusual penal legislation rightly enforceable by this Court. Nor can we believe that the Amendment's prohibition is restricted to live disembowelment and similar long-gone butcheries—nor, on the other hand, that it invokes the unassisted penological impressions of particular Justices. The *Weems-Trop* test *is*, we submit, the proper one. Common standards of decency in our contemporary society *do* set the limits of punishment allowable under the Eighth Amendment. The problem is how those standards are to be ascertained, and with regard to what specific question.

We begin with the specific question. When a man such as Earnest Aikens comes before the Court claiming that the law under which he was sentenced provides for an unconstitutional cruel and unusual punishment, the question is not: will contemporary standards of decency allow the existence of such a general law on the books? The question is, rather: will contemporary standards of decency allow the general application of the law's penalty *in fact*? The distinction which we draw here lies between what public conscience will allow the law to *say* and what it will allow the law to *do*—between what public decency will permit a penal statute to threaten and what it will allow the law to carry out—between what common revulsion will forbid a government to put upon its statute books as the extreme, dire terror of the State (not to be ordinarily, regularly or in other than a few rare cases enforced), and what public revulsion would forbid a government to do to its citizens if the penalty of the law were generally, even-handedly, non-arbitrarily enforced in all of the cases to which it applied.

This last point—regarding general, even-handed, non-arbitrary application—is critical. For in it lies, we think, a large part of the need to have a Cruel and Unusual Punishment Clause in the Constitution, and of the need to have courts enforce it. The government envisaged for this country by the Constitution is a democratic one, and in a democracy there is little reason to fear that penal laws will be placed upon the books which, in their general application,

would affront the public conscience. The real danger concerning cruel and inhuman laws is that they will be enacted in a form such that they can be applied sparsely and spottily to unhappy minorities, whose numbers are so few, whose plight so invisible, and whose persons so unpopular, that society can readily bear to see them suffer torments which would not for a moment be accepted as penalties of general application to the populace.[36]

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[36] A recent detailed analysis of the historical origins of the cruel and unusual punishment clause of the Eighth Amendment demonstrates that the provision of the English Bill of Rights of 1689 from which the Eighth Amendment's language was taken *verbatim* was concerned primarily with the irregular, selective application of harsh (but not intrinsically barbaric) punishments; and that its cardinal aim was to forbid the oppressive exercises of a legally unregulated power to mete out severe punishments arbitrarily. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 845-847, 852-860 (1969). To be sure, Granucci also finds that the American Framers imperfectly understood the English background of the Cruel and Unusual Punishment Clause, and that they were themselves principally concerned with the problem of intrinsically barbaric penalties. But this does not support a conclusion that the Framers meant to wholly alter the meaning of the guarantee which they found in the English traditions, or to reject protections of the citizen long preserved by their English heritage.

The debates in Congress and in the ratifying conventions concerning the Eighth Amendment are set forth in Appendix D to this brief. Discussion of the Cruel and Unusual Punishment Clause was notably brief; and only one or two of those who voted for it spoke. What they said unquestionably sustains the view that they meant to *include* in the guarantee a proscription of inherently barbarous penalties. It does not sustain the view that they meant to jettison other restrictions upon punishment which were encompassed by the language that they took as embodying the basic rights of the citizen evolved through the course of English history. To the contrary, it is apparent that the principal motive force behind inclusion of the Eighth Amendment in the Constitution was the relatively simple and imprecise notion that its guarantees had always been recognized as restrictions upon English government, and that the new national government established by the Constitution and given considerable powers over individuals could not safely be unleashed from the same safeguards.

Herein is found the difference between the judgment which the legislator makes, responding *politically* to public conscience, and the judgment which a court must make under the obligation that the Eighth Amendment imposes upon it to respond *rationally* to public conscience. A legislator may not scruple to put a law on the books (still less, to maintain an old law on the books) whose general, even-handed, non-arbitrary application the public would abhor–precisely because both he and the public know that it will not be enforced generally, even-handedly, non-arbitrarily. But a court cannot sustain such a law under the Eighth Amendment. It cannot do so because both the Amendment itself and our most fundamental principles of due process and equal protection forbid American governments the devices of arbitrariness and irregularity, even as a sop to public conscience.

To put the matter another way, there is nothing in the political process by which public opinion manifests itself in legislated laws that protects the isolated individual from being cruelly treated by the state. Public conscience often will support laws enabling him to be so mistreated, provided that arbitrary selection can be made in such a fashion as to keep his numbers small and the horror of his condition mute.[37] Legislators neither must nor do take account of

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[37]William Forsyth wrote:

> "... When in respect of any class of offenses the difficulty of obtaining convictions is at all general in England, we may hold it as an axiom, that the law requires amendment. Such conduct in juries is the silent protest of the people against its undue severity. This was strongly exemplified in the case of prosecutions for the forgery of bank-notes, when it was a capital felony. It was in vain that the charge was proved. Juries would not condemn men to the gallows for an offense of which the punishment was out of all proportion to the crime; and as they could not mitigate the sentence they brought in verdicts of Not Guilty. The consequence was, that the law was changed; and when secondary punishments were substituted for the penalty of death, a forger had no better chance of an acquittal than any other criminal. Thus it is that the power which juries possess of refusing to put the law in force has, in the words of Lord John Russell, 'been the

such individuals.[38] But it is the precise business of courts to take account of them, and to disallow under the Eighth Amendment the application to them of penalties so harsh that public conscience would be appalled by their less arbitrary application.[39]

We shall develop this theme more fully, in the pages that follow, with regard to the death penalty. But we have said enough, at this point, to enable us to state our major submission on behalf of Earnest Aikens. His sentence of death for the crime of first-degree murder is an unconstitutional

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cause of amending many bad laws which the judges would have administered with professional bigotry, and above all, it has this important and useful consequence, that laws totally repugnant to the feelings of the community for which they are made, can not long prevail in England.'"

FORSYTH, HISTORY OF TRIAL BY JURY (2d ed. 1878), 367-368. However, as this Court recognized in *McGautha v. California*, 402 U.S. 183 (1971) the American Legislative response to "the problem of jury nullification" in capital cases was to substitute discretionary for mandatory capital sentencing provisions. In this way, laws which might be "totally repugnant to the feelings of the community" as applied to the generality of cases could nevertheless be preserved for sporadic application, free of the pressures of either jury nullification or public pressure on the legislature.

[38]See *Ralph v. Warden*, 438 F.2d 786, 792 (4th Cir. 1970):

> "Although the legislature has the responsibility of establishing criminal penalties, subject only to constitutional limitations, popular acceptance or rejection of capital punishment is reflected by the incidence of actual executions. When the death penalty for rape is exacted with the infrequency that the statistics disclose, there is little pressure for amendment. Public awareness diminishes as the frequency of imposing the penalty decreases, and legislative action is not likely to be prompted when the consequences befall only a few prisoners. For purposes of ascertaining evolving standards, the retention of the death penalty for rape in the codes of some states is less significant than its steady fall into disuse and the present moratorium on executions."

[39]A somewhat similar analysis leads Goldberg and Dershowitz to the conclusion that "A penalty . . . should be considered 'unusually' imposed [in the sense of the Eighth Amendment] if it is administered arbitrarily or discriminatorily." Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790 (1970).

cruel and unusual punishment because it affronts contemporary standards of decency, universally felt, that would condemn the use of death as a penalty for that crime if such a penalty were uniformly, regularly, and even-handedly applied either to all first-degree murderers or to any reasonable proportion of those eligible for the penalty under California law.[40]

We use the term "reasonable proportion" in order to exclude the sort of tolerance which a law may obtain through rare—or, in the constitutional sense, "unusual"[41]—applica-

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[40]In saying this, we do not ignore the aggravating features of Earnest Aikens' own case. Those features are immaterial for present purposes, because under California law Aikens' sentence of death need not, and does not, depend upon them. Cases presenting the same or worse features might result in a life sentence; cases presenting strongly mitigating circumstances might draw down a death verdict. It is meaningless to ask how enlightened public opinion would react to any particular case. The relevant Eighth Amendment touchstone is the judgment of enlightened public opinion upon the use of the penalty prescribed for the crime defined by law.

[41]"Whether the word 'unusual' has any qualitative meaning different from 'cruel' is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. See *Weems v. United States,. . . ; O'Neil v. Vermont,. . . ; Wilkerson v. Utah,. . . .* These cases indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word 'unusual.' But cf. *In re Kemmler,. . . ; United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson,* 255 U.S. 407, 430 (Brandeis, J., dissenting). If the word 'unusual' is to have any meaning apart from the word 'cruel,' however, the meaning should be the ordinary one, signifying something different from that which is generally done." *Trop v. Dulles,* 356 U.S. 86, 100-101 n. 32 (1958) (plurality opinion of Chief Justice Warren). We think that the constitutional word "unusual" does have some meaning, see note 36, *supra;* and that in determining whether a particular punishment is "unusual" or "different from that which is generally done," it is necessary to look to the actual infliction of the punishment, not its mere statutory authorization. See *Ralph v. Warden,* 438 F.2d 786, 792, (4th Cir. 1970), quoted in note 38, *supra; O'Neil v. Vermont,* 144

tion. We do so for the reasons which we have just stated: that is, because we believe that the Cruel and Unusual Punishment Clause is designed precisely to condemn any penalty so oppressive that it can command public acceptance only by virtue of extremely infrequent and sporadic enforcement. Laws are written to be enforced with practicable generality in the cases to which they apply; and so it is a fair measure of a law's acceptability to imagine its general enforcement. Let us do so with regard to capital punishment for first-degree murder.

Let us take a very modest standard of generality and assume that the United States were to execute 184 first-degree murderers this year. We have chosen that figure—in the absence of any obtainable information concerning the number of first-degree murder convictions annually[42]—because it represents the largest number of murderers executed in the country since reliable counts began to be kept in 1930. During the year 1935, 184 men and women were put to death for murder in the United States.[43] Of course, it is absurd to suppose that as few first-degree murder convictions are returned yearly in the 1970's as in the 1930's; and

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U.S. 323, 337, 338 (1892) (Mr. Justice Field, dissenting). *Cf. Wilkerson v. Utah*, 99 U.S. 130, 135 (1879), which, after recounting Blackstone's enumeration of the methods of execution authorized by English law (*i.e.*, live disembowelment, beheading and quartering), adds: "History confirms the truth of these atrocities, but the commentator states that the humanity of the nation by tacit consent allowed the mitigation of such parts of those judgments as savored of torture or cruelty, and he states that they were seldom strictly carried into effect."

[42]See Appendix F *infra*. And see Bedau, *Volume and Rate of Capital Crimes*, in BEDAU, THE DEATH PENALTY IN AMERICA (Rev. ed. 1967) [hereafter cited as BEDAU], 56-74.

[43]UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 45, *Capital Punishment 1930-1968* (August 1969) [hereafter cited as NPS (1968)], p. 7.

even in the 1930's such knowledgeable observers as Warden Lewis E. Lawes of Sing Sing recognized that the death penalty was not being generally enforced.[44] Nonetheless, let us take the 1935 national high-water mark of 184 first-degree murderers as a measure of some generality of enforcement of the death penalty for murder.

Imagine now 184 electrocutions and gassings in the United States in 1971. That is four times the number of human beings executed during any of the past ten years, and exceeds by 50 the total number of executions for the ten-year period.[45] If, in fact, 184 murderers were to be executed in this year 1971, we submit it is palpable that the public conscience of the Nation would be profoundly and fundamentally revolted, and that the death penalty for murder would be abolished forthwith as the atavistic horror that it is. Our detailed reasons for this submission follow. First, we pause for one additional paragraph to make our legal point clear.

We disagree not at all with the reasoning process, but we dispute the factual premise—unexamined then and now demonstrably incorrect—of the *dictum* announced by this Court thirteen years ago in *Trop v. Dulles,* 356 U.S. 86 (1958):

> ". . . Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, *in a day when it is still widely accepted,* it cannot be said to violate the constitutional concept of cruelty." (*Id.* at 99 (plurality opinion of Chief Justice Warren; emphasis added).)

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[44] LAWES, TWENTY THOUSAND YEARS IN SING SING (1932), 306-307, quoted at note 96, *infra.*

[45] See p. 37, *infra.*

We think that it is simply not correct that the death penalty is today "still widely accepted." We speak, for the reasons that we have already stated, not of its acceptance on the pages of the statute books, but of its acceptance in actual usage—and of such acceptance as it does not illegitimately obtain by being irregularly and arbitrarily applied. Far from being "widely accepted", the death penalty today is with rare public unanimity rejected and repudiated. We proceed next to demonstrate this point and to develop its constitutional implications.

III. THE PENALTY OF DEATH

The acceptance which a punishment is given by contemporary society, and its acceptability under that society's prevailing standards of decency, may be measured by objective indicators. In the case of the death penalty today, numerous indicators point in a single direction. Language requires that we state them one by one; but it is their plain convergence that, we think, marks the punishment of death as unacceptable, cruel and unusual.

(1) All informed observers of the death penalty agree in describing a world-wide trend toward its disuse that is nothing short of drastic.[46] This has been a relatively constant long-

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[46]UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) (1968) [hereafter cited as UNITED NATIONS] 81-82, 96-97, UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, Note by the Secretary-General, *Capital Punishment* (E/4947) (February 23, 1971), pp. 3, 10; SELLIN, THE DEATH PENALTY (1959), published as an appendix to AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Tent. Draft No. 9 (May 8, 1959) [hereafter cited as SELLIN (1959)], 4-14; Sellin, *The Inevitable End of Capital Punishment*, in SELLIN, (1967), 239-240; MATTICK, THE UNEXAMINED DEATH (1966) [hereafter cited as MATTICK], 5-6, WEIHOFEN, THE URGE TO PUNISH (1956) [hereafter cited as WEIHOFEN], 163-164; OHIO LEGISLATIVE SERVICE COMMISSION, STAFF RESEARCH REPORT No. 46, CAPITAL PUNISHMENT (1961), 16-30; Barry, *Hanged by the Neck Until . . .*, 2 SYDNEY L. REV. 401, 411 (1958);

term development, despite expectable short-term swings.[47] Whereas Jeremy Bentham wrote in 1831 that "on the part of rulers–general custom–general at least, not to say universal–delivers its testimony in favour of this punishment,"[48] it is now the case that most of the nations of Western Europe and the Western Hemisphere have legally abolished capital punishment as a penalty for civilian crime.[49] The majority of nations in the world retain the death penalty

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Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 9-11 (1964); Kuebler, *Punishment by Death*, 2 EDITORIAL RESEARCH REPORTS (No. 3) 527, 527-537 (July 17, 1963); Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8 (1952); Professor Playfair, in *Symposium on Capital Punishment*, 7 N.Y.L. FORUM 247, 262 (1961).

[47] Appendix E to this brief describes the world trend toward abolition of the death penalty during the past two centuries. See also ANCEL, THE DEATH PENALTY IN EUROPEAN COUNTRIES (Counsel of Europe, European Committee on Crime Problems, 1962) [hereafter cited as ANCEL], 8-13; Kahn, *The Death Penalty in South Africa*, 18 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG 108, 115 (1970) [hereafter cited as Kahn]; JOYCE, CAPITAL PUNISHMENT: A WORLD VIEW (1961), 56-193; LAURENCE, A HISTORY OF CAPITAL PUNISHMENT (1932), 1-27.

[48] BENTHAM, TO HIS FELLOW CITIZENS OF FRANCE, ON DEATH PUNISHMENT (1831), 3.

[49] See Appendix E to this brief. See also UNITED NATIONS 9-11, 83-87; Sellin, *The Inevitable End of Capital Punishment*, in SELLIN (1967), 240; ANCEL 13-16; SCOTT, THE HISTORY OF CAPITAL PUNISHMENT (1950), 74-75. Since the last three works were published, capital punishment has been abolished for civilian crimes in the United Kingdom, except for treason and a few essentially obsolete offenses (see note 58, *infra*); in Canada, except for murder of police and corrections officials, treason, and piracy with violence (see note 62, *infra*); in two additional Mexican states, with the result that 29 of Mexico's 32 jurisdictions are now abolitionist (see UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, Note by the Secretary-General, *Capital Punishment* (E/4947) (February 23, 1971), p. 10); and in Austria, even for "exceptional cases" *(ibid.)*.

on the books but use it relatively infrequently.[50] Estimates of the total number of executions in the world today must necessarily remain speculative, but the figure probably does not much exceed the 560 executions estimated to have occurred in London and Middlesex alone each year during the mid-sixteenth century.[51] These figures are assuredly very crude, but in general terms they mark the magnitude

[50]Patrick, whose execution figures appear to be somewhat high (see note 51 *infra*), found that out of 89 countries which made legal provision for the death penalty during the period 1958-1962, there were 36 which executed not a single human being through the five-year period. Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. CRIM. L., CRIM. & POL. SCI. 397, 409 (1965). See also UNITED NATIONS 96. Patrick reports 13 additional countries which conducted fewer than one execution per year; 24 countries which conducted one to five executions; 10 countries which conducted between fifty and one hundred executions. Patrick, op. cit. supra, at 409. The Republic of South Africa appears to be the known world leader in executions, averaging about one hundred per year. Kahn, 116-118.

[51]The derivation of the average annual figure of 560 for the last decade of the reign of Henry VIII and throughout the reign of Edward VI is set forth in 1 RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 (1948), 142 n. 20.

As we have indicated in note 22 *supra*, an annual average total of about 535 executions is reported for the period 1958-1962 by Patrick, for the major capital-punishment countries of the world, excluding the communist nations and eleven non-communist nations (some of them relatively populous). Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. CRIM. L., CRIM. & POL. SCI. 397, 408 (1965). However, there are reasons to believe that this figure is inaccurately large. Where there is overlapping between the numbers of executions reported by Patrick and the presumably more reliable numbers gathered by the United Nations Department of Economic and Social Affairs for the two periods 1956-1960 and 1961-1965, Patrick's figures are consistently higher. See UNITED NATIONS 43-44, 96-97. The two reports may be consistent, of course, if executions peaked strongly in the middle of the 1956-1965 period, but there is no reason to suppose such a peaking. Second, Patrick does not disclose the terms of his inquiries to his correspondents; and it is entirely possible that his reports include executions in political and

of the trend toward *de facto* abolition.[52] So far has this trend progressed that the Secretary-General of the United Nations recently reported to the Economic and Social Council that: "Those countries retaining the death penalty report that in practice it is only exceptionally applied and frequently the persons condemned are later pardoned by executive authority."[53] And, notwithstanding its habitual cautiousness and deference to national sovereignty in domestic matters, the United Nations Economic and Social Council recently adopted a resolution affirming "that the main

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military contexts which should be put out of account for present purposes. Third (a relatively small matter), Patrick's own columnar figures do not total to 535.3, as he says, but to 517.1. Patrick, *op. cit., supra,* at 398-404.

In any event the figures today are almost certainly lower than those for 1962-1963. The United States contributed 48.6 executions per year to Patrick's total, *id.* at 404; and we know that there have been no executions in this country since 1967. Among the nations reporting to the United Nations for both the 1956-1960 and the 1961-1965 periods, there was a sharp decline in executions from the first to the second period (UNITED NATIONS 96-97); a number of nations have abolished capital punishment *de jure* since 1962 (see Appendix E to this brief); and the only country in the world where it is definitively known that executions have been lately on the increase is the Republic of South Africa (Kahn, 116; and compare Van Niekerk, *The Administration of Justice, Law Reform and Jurisprudence,* [1967] ANNUAL SURVEY OF SOUTH AFRICAN LAW 444, 471-472, with Patrick). Projecting the 40% decrease found in the United Nations figures for countries which reported during both of its reporting periods, and assuming that the extent to which American executions have exceeded the 40% rate more than offsets the increase in South Africa, there would be fewer than 200 executions a year today in the countries studied by Patrick. We would have to nearly treble that figure, in consideration of the communist and eleven non-communist countries—surely a generous allowance—in order to bring the world total to 560.

[52]See ANCEL 12: "Abolition in law has in almost all cases been preceded by abolition in practice . . . ."

[53]UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, Note by the Secretary-General, *Capital Punishment* (E/4947) (February 23, 1971), p. 3.

objective to be pursued is that of progressively restricting the number of offences for which capital punishment might be imposed with a view to the desirability of abolishing this punishment in all countries so that the right to life, provided for in Article 3 of the Universal Declaration of Human Rights may be fully guaranteed."[54]

(2) This historical development has not been a mere collection of happenings unanimated by a theme. Capital punishment has not simply atrophied or gone out of fad in the world, but has been progressively rejected in the course of an ideological and moral debate resonant with concerns that are intimately connected with the "principle of civilized treatment" and "the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 99, 100 (1958) (plurality opinion of Chief Justice Warren). Any sampling of the literature of this debate makes manifest that—although there are entirely convincing practical reasons for putting an end to the death penalty—the principal arguments urged to support its abolition have always been humanistic, and concerned with fundamental human decency.[55] We need cite but a few of the most obvious examples.[56]

[54]UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, Resolution 1574(L), *Capital Punishment*, adopted May 20, 1971 (E/RES/1574(L), May 28, 1971).

[55]The arguments for and against capital punishment have been frequently catalogued. See, e.g., FAVREAU, CAPITAL PUNISHMENT: MATERIAL RELATING TO ITS PURPOSE AND VALUE (compiled by Hon. Guy Favreau, Canadian Minister of Justice) (Queen's Printer, Ottawa, 1965) [hereafter cited as FAVREAU], 22-35; Vialet, Capital Punishment: Pro and Con Arguments (United States, Library of Congress, Legislative Reference Service, mimeo, August 3, 1966), reprinted in *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 2d Sess., on S. 1760*, To Abolish the Death Penalty (March 20-21 and July 2, 1968) (G.P.O. 1970) [hereafter cited as *Hearings*], 172-200; UNITED NATIONS 61-64, 115-124; BEDAU 120-231; SELLIN (1967), 3-21, 39-104; 2 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS (G.P.O. 1970), 1350-1363.

[56]BOK, STAR WORMWOOD (1959); CALVERT, CAPITAL PUNISHMENT IN THE TWENTIETH CENTURY (1927); Camus, *Reflec-*

It is for this reason, of course, that capital punishment, uniquely among secular penal institutions, has become the subject of intense concern by religious groups.[57] For the same reason, the long-enduring struggle for legal abolition has been waged with the fervor of a crusade.[58] The same reason brought Albert Camus to call the abolition of the death penalty "a great civilizing step";[59] it brought former Attorney General Ramsey Clark to call abolition "a major

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tions on the Guillotine, in CAMUS, RESISTANCE, REBELLION AND DEATH (1961), 173 [hereafter cited as CAMUS]; GOWERS, A LIFE FOR A LIFE (1956); KOESTLER, REFLECTIONS ON HANGING (Amer. ed. 1957) [hereafter cited as KOESTLER].

[57]See Bedau, *The Issue of Capital Punishment*, 53 CURRENT HISTORY (No. 312) 82, 84-85 (Aug. 1967); *Hearings* 155-156. The expressions of denominations are set forth in the Appendix to the *Amici Curiae* Brief of the American Friends Service Committee, et. al., in *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (O.T. 1967, No. 1015).

[58]The history of the struggle in England is recounted in 1 RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 (1948); TUTTLE, THE CRUSADE AGAINST CAPITAL PUNISHMENT IN GREAT BRITAIN (1961); PHILLIPSON, THREE CRIMINAL LAW REFORMERS (1923). Final abolition came in December, 1969, when the House of Commons and the House of Lords respectively agreed to the permanent continuation of the abrogation of capital punishment for murder which had been provided during an experimental five year period by the Murder (Abolition of Death Penalty) Act 1965, [1965] 2 PUBLIC GENERAL ACTS, ch. 71, p. 1577 (Nov. 8, 1965). See 793 HANSARD, PARLIAMENTARY DEBATES (5th series) (Commons, 44th Parl., 4th Sess., 1969-1970), 1294-1298 (December 16, 1969); 306 *id.* Lords, 44th Parl., 4th Sess., 1969-1970), 1317-1322 (December 18, 1969). It is true that capital punishment continues to be provided for treason, piracy with violence, dockyards arson and some military offenses (Professor Radzinowicz, in *Hearings*, at 57), but its execution for these crimes seems unlikely. The American history appears in BYE, CAPITAL PUNISHMENT IN THE UNITED STATES (1919); Bedau, *General Introduction*, in BEDAU 1-32; Filler, *Movements to Abolish the Death Penalty in the United States*, 284 ANNALS 124 (1952). See also BLOCK, AND MAY GOD HAVE MERCY (1962), 83-173.

milestone in the long road up from barbarism;"[60] and it brought the Archbishop of Canterbury to conclude, following the abolition of capital punishment for murder in Great Britain in 1969, that:

> "Abolition of capital punishment, once and for all, will help create a more civilized society in which to continue the search for the causes of crime . . . I am certain it will redound in very many ways to the advantage and honor of the nation."[61]

We set forth these expressions not for the purpose of convincing the Court that Albert Camus, or Ramsey Clark, or Michael Ramsey, is correct, as a moral matter. The point is simply that the terms they use are archetypal reflections of the terms in which the capital punishment controversy has been fought during the years in which world history has progressively, and now quite thoroughly, abandoned the death penalty. Opposition to capital punishment has invariably been asserted on the basis of "fundamental moral and social values in our civilization and in our society."[62] For this reason, the present marked attrition

[60]Statement of Attorney General Ramsey Clark, in *Hearings*, at 91. See CLARK, CRIME IN AMERICA (1970), 336.

[61]*The New York Times*, December 19, 1969, p. 9.

[62]"I have tried to show that in dealing with this issue we should all be concerned—as I see it, primarily concerned—with the protection of society from the crime of murder. But we are also concerned—and this concern has been voiced by many speakers in this debate—with certain fundamental moral and social values in our civilization and in our society." Prime Minister Lester B. Pearson, addressing the House of Commons in support of a bill restricting the death penalty for murder in Canada. CANADA, HOUSE OF COMMONS, IV DEBATES, 27th Parl., 2d Sess. (16 Eliz. II), 4370 (Nov. 16, 1967). Prime Minister Pearson, who favors total abolition, concluded that: "If we cannot yet eliminate capital punishment entirely from the Canadian system of justice, if we have not yet achieved that degree of civilization, then let us at least take the important step toward that time which is now open to every one of us in this house." *Id.* at 4372.

Following the debate in which the Prime Minister spoke, Parliament did adopt the statute, An Act to amend the Criminal Code, 16

of the use of capital punishment throughout the world must be seen as something more than a sort of aimless obsolescence. It can only fairly be seen, in the light of the forceful struggle waged around the penalty of death, as a repudiation.[63]

(3) One further point connected with the ideological history of this repudiation of the death penalty bears emphasis. The values which have been most consistently opposed to capital punishment, and which have largely extirpated it in the western world over the course of the last two centuries, lie very close to the root of the Anglo-American conception of a free and civilized society. Sellin has written that:

> ". . . the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and

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Eliz. II, ch. 15, [1967-1968] I ACTS OF CANADA (16 & 17 Eliz. II) 145 (1967), whose effect is to abolish the death penalty for all murders other than murders of police or corrections officers in the course of duty. Like the English abolition act of 1965 (see note 58 *supra*), the Canadian act is effective for a five-year period, and must then be renewed to remain in force. Canada also retains on the books legislation providing capital punishment for treason and for piracy with violence. II REV. STAT. OF CANADA (1970), ch. C-34, §§46-47, 75.

The Canadian debates, like those upon the English abolition bills in 1965 and 1969, demonstrate that the abolitionists generally drew support from those "fundamental moral and social values in our civilization" invoked by Prime Minister Pearson. See CANADA, HOUSE OF COMMONS, IV and V DEBATES, 27th Parl., 2d Sess. (16 Eliz. II), 4077-4891 (1967); 709-716 HANSARD, PARLIAMENTARY DEBATES (5th series) (Commons, 43d Parl., 1st Sess., 1964-1965), [709] 487-[716] 466 (1965); 268 and 269 *id.* (Lords, 43d Parl., 1st Sess., 1964-1965), [268] 455-[269] 554 (1965); 793 *id.* (Commons, 44th Parl., 4th Sess., 1969-1970), 1147-1294 (1969); 306 *id.* (Lords, 44th Parl., 4th Sess., 1969-1970), 1106-1318 (1969).

[63] Bentham accurately foretold the development: "And, as the dissocial affections decrease in strength, and the social increase—in a word, as civilization advances—the reluctance to contribute to the infliction of this punishment will increase . . ." BENTHAM, TO HIS FELLOW CITIZENS OF FRANCE, ON DEATH PUNISHMENT (1831), 5.

dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries."[64]

This is not to say, of course, that no one does or can approve the death penalty for other reasons than belief in

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[64]SELLIN (1959) 15. See also ANCEL 9:

> "The abolitionist movement began in the 18th century under the influence of humanitarian philosophy. It is bound up with the establishment of classical penal law, in so far as this endeavours to substitute for vengeance and expiation the notion of rational retribution based on the offence, to distinguish between substantive law and moral law, to punish in the interests of society and to find a coercive and corrective substitute in sentences of imprisonment for the old corporal punishments."

And see PLAYFAIR & SINGTON, THE OFFENDERS (1957), 230:

> "[T]he death penalty belongs historically to a purely punitive penal system, founded on the ecclesiastical notion of the expiation of crime and expressed chiefly in violence of an unspeakably brutal kind. This notion, during the past two hundred years, has been in full retreat everywhere before the advance of humanitarian and scientific influences."

This point is borne out forcefully when one considers the professional identifications of those who have traditionally opposed, or supported, capital punishment:

> "In the first place, it will be noted that, among the leading authorities in penal science, the supporters of abolition appreciably outnumber those who favour the retention of capital punishment. The specialists of the social sciences, criminologists, sociologists, penologists, psychologists, doctors and writers on social science and criminology are, in their great majority, abolitionists. The supporters of capital punishment, apart from a number of political figures and persons holding high public office, are generally jurists with a traditional training and judges."

UNITED NATIONS 64. *Accord: id.* at 124; BEDAU 122-123; and see West, *Medicine and Capital Punishment,* in *Hearings,* at 124; KOESTLER 21-40.

retribution, atonement or vengeance; but it is significant that those beliefs have been historically the mainstays of support for the institution of capital punishment, while the movement for abolition has been spearheaded by concerns derived from conceptions of the worth and dignity of the individual. The ultimate premise and lesson of capital punishment is "'that a man's life ceases to be sacred when it is thought useful to kill him.'"[65] Little wonder that the nations of the world most closely allied with our own in traditions, and sharing our heritage and aspirations of respect for the citizen, have now overwhelmingly rejected the death penalty.[66]

(4) So has the United States. In this country, the decreasing trend of executions has been consistent and dramatic. The National Crime Commission recently noted that:

> "The most salient characteristic of capital punishment is that it is infrequently applied. . . . [A]ll available data indicate that judges, juries and governors are becoming increasingly reluctant to impose or authorize the carrying out of a death sentence." (PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967), 143.)

The extent to which this is true appears upon inspection of the highly reliable figures on executions maintained by the Federal Bureau of Prisons since 1930. Its latest cumulative report shows that 3,859 persons were executed under civil authority in the United States between 1930 and 1968. UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 45, *Capital Punishment 1930-1968* (August 1969) [hereafter cited as NPS (1968)], p. 7. Of these 3,859 men and women, only 191 were executed during the decade of

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[65] Francart, quoted in CAMUS 229.

[66] See Appendix E to this brief.

the 1960's, only 25 since the end of 1963 (*ibid.*); and no one has been executed in the United States during more than four years since June 2, 1967. The trend is adequately shown by setting out the figures for the number of executions during each of the following representative years (*ibid.*):

Total Number of Executions in the United States

1930	155	1963	21
1935	199	1964	15
1940	124	1965	7
1945	117	1966	1
1950	82	1967	2
1955	76	1968	0
1960	56	1969	0
1961	42	1970	0
1962	47		

Although forty-one States, the federal government and the District of Columbia authorize the death penalty by law for at least one offense,[67] fourteen of these forty-three jurisdictions have carried out no executions since 1960.[68] Nineteen have carried out no executions since 1961.[69] Twenty-four have carried out no executions since 1962.[70] Thirty

[67] Appendix G to this brief collects the capital sentencing provisions currently in force in the United States. The death penalty is not authorized by law in Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia, or Wisconsin. Puerto Rico and the Virgin Islands are also abolitionist. (See Appendix E to this brief, footnote 10e.) Of the forty-three American jurisdictions which allow capital punishment at all, five (New Mexico, New York, North Dakota, Rhode Island and Vermont) restrict it severely.

[68] NPS (1968) 8-9: Connecticut, Delaware, Idaho, Massachusetts, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Rhode Island, South Dakota, Tennessee, Utah, and the District of Columbia.

[69] NPS (1968) 8-9. States conducting their last executions in 1961 are Indiana, Louisiana, Maryland, Nevada and North Carolina.

[70] NPS (1968) 8-9. States conducting their last executions in 1962 are Illinois, Kentucky, Pennsylvania, South Carolina and Virginia.

have carried out no executions since 1963.[71] Thirty-five have carried out no executions since 1964.[72]

It is interesting to note the regional distribution of the executions. (We shall return later to the racial figures.) Of the 3,859 persons killed since 1930, 33 were executed by the federal government; 608 by nine northeastern States; 403 by twelve north-central States; 509 by thirteen western States; and 2,306 by sixteen southern States and the District of Columbia. (*Id.* at 8-9.) Since 1960, the corresponding figures for 191 executions are as follows: federal–1; northeastern States–17; north-central States–21; western States–48; southern States and D.C.–104. (*Ibid.*) As of December 31, 1968, there were 479 men on death row throughout the entire country. One of these was a federal prisoner; 62 were in the northeastern States; 67 were in the north-central States; 114 were in the western States; and 235 were in the southern States and D.C. (*Id.* at 22-23.)

(5) We summarize our conclusions from the preceding paragraphs as follows: Actual use of the death penalty throughout the world has declined precipitously against the background of a strong ideological controversy in which the increasingly prevailing forces of abolition have staked their case primarily upon the inhumanity and indecency of the penalty. They have prevailed virtually universally–and most notably in countries sharing our western humanist traditions –to the extent that today, the execution of a capital sentence is an almost indescribably uncommon event. Within the United States, it is plainly the most uncommon of all punishments for crime.[73] In this country, executions vary

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[71] NPS (1968) 8-9. States conducting their last executions in 1963 are Arizona, New Jersey, New York, Ohio, Washington and the federal jurisdiction.

[72] NPS (1968) 8-9. States conducting their last executions in 1964 are Arkansas, Florida, Georgia, Mississippi and Texas.

[73] Sellin, *The Inevitable End of Capital Punishment*, in SELLIN (1967), 239.

as a function of geography and are preponderately a southern phenomenon; but, since 1958 at the least, executions in all regions of the United States for any crime have been rare. Since 1963 they have been freakishly rare.

(6) What do these almost incredible rarities in the use of capital punishment imply for the constitutional issue before the Court? In the first place, they obviously imply—in the language of *Trop v. Dulles, supra*—that capital punishment is *not* "still widely accepted" in contemporary America. Recently, this Court cited public opinion polls indicating that about half the American people say they believe in the death penalty. *Witherspoon v. Illinois*, 391 U.S. 510, 519-520 (1968). While it seems to us unthinkable that human life should be taken in the name of an institution that is so equivocally and marginally received—even in theory—as this, we do not rely upon the polls. For the value of such polls[74] is very slight as a gauge of the standards of decency to which the Eighth Amendment bids this Court look.

This is so because opinions tapped in this fashion are notoriously fickle and particularly unreliable after several years without an execution.[75] But it is so primarily because the citizen who deals with a poll-taker—like the legislator who puts or maintains a capital statute on the books—can have his cake and eat it too. He can afford to approve the principle of killing because in practice the persons selected to die will be so few as to go unnoticed. The real measure of American moral attitudes about the death penalty is reflected in what this Nation of 200 million people *does*.[76]

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[74] The poll results are collected in Erskine, *The Polls: Capital Punishment*, 34 PUBLIC OPINION QUARTERLY 290 (1970).

[75] Short-term swings in public opinion respond to the most recently publicized outrageous execution or outrageous crime. "If the last victim happens to arouse pity—a feeble-minded boy for instance, unhinged by the movies, or a mother of two children, half-crazed by gin and jealousy—up go the 'nays' of mercy like a flight of doves; if he is a cool customer like Christie, up go the 'ayes' like a swarm of vultures." KOESTLER 163.

[76] See *Ralph v. Warden*, 438 F.2d 786, 792 (4th Cir. 1970), quoted in note 38 *supra*.

What it has done, in the years 1965-1970 inclusive, is to execute only ten people.

Of course, stays of execution and state and federal post-conviction proceedings on behalf of condemned men affect these figures, but not very much. In May of 1971, there were only 648 men on death row, notwithstanding the near cessation of executions since the end of 1964.[77] And even this figure conveys an inflated image of the number of men destined to be killed.[78] Plainly, the processes of American

[77] *The New York Times*, May 4, 1971, p. 30.

[78] Since 1967, a nation-wide effort has been maintained to obtain stays of execution for all condemned men pending disposition by this Court of the constitutional issue now presented. As a part of that effort, counsel for petitioner Aikens also represent several hundred other condemned men, and are consulting with attorneys who represent a large proportion of the remainder. It is our uniform experience that governors will almost never give consideration to commutation in a capital case while judicial proceedings are pending; and frequently they will not consider commutation so long as there is any reason simply to defer the matter by the granting of a gubernatorial stay. As a result, the years 1967-1971 which have seen a complete cessation of executions have also seen an almost equally complete cessation of commutations. There have been exceptions, of course—most notably Governor Winthrop Rockefeller's commutation of the sentences of all fifteen men on Arkansas' death row in December, 1970, and Governor West's commutation of three death sentences in South Carolina this year—but, for the most part, the processes of commutation have not been functioning during the past four years.

Another effect of the four-year moratorium on executions is more difficult to document, but has impressed informed observers. The *Philadelphia Sunday Bulletin*, May 23, 1971, reports:

> "Jurors are finding it easier to impose the death sentence in murder cases now because they believe it will never be carried out, William J. Stevens, Jr., assistant district attorney in charge of homicides, said yesterday.
>
> "He made the comment after a reporter pointed out that in the last two months juries in Common Pleas courts here have sentenced two defendants to death for first-degree murder, although 'death row' has been abolished.
>
> "Stevens emphasized that Governor Shapp has said no prisoner will be executed while he is in office. Prior to

justice through which the conscience of a people may be glimpsed are sending very, very few men onto death row, and taking most of them off again before execution day. What American acceptance of the death penalty now boils down to is that America can stomach a few legal killings a year.

(7) One may look at these figures from another direction as well. No one knows or can estimate accurately how

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Shapp's inauguration last January, the state had observed an eight-year amnesty on imposition of the death penalty.

Easier to Impose

"'With all the pronouncements against the death penalty,' said Stevens, 'the public's back is up. And when the public is assured by the governor that he will (decree amnesty for) all death sentences, it is easier for a person to impose it.

"'For me personally, it would resolve any residual doubts when I know it's a token gesture anyway.'"

"Stevens said some jurors also are taking a harder line because many prisoners sentenced to life become eligible for parole after 15 years—and the time served is decreasing steadily.

"He said that if life sentences meant prisoners would spend their remaining years in jail, juries would rarely impose a death sentence. He noted that some states allow juries to impose life sentences without parole as an alternative to death sentences."

On the other hand, of course, the death-row population has been somewhat reduced by the effects of this Court's decisions in *United States v. Jackson*, 390 U.S. 570 (1968), and *Witherspoon v. Illinois*, 391 U.S. 510 (1969). But those effects have been minimal insofar as the reported figure of 648 condemned men on May 4, 1971 is concerned. It was not until June 28, 1971 that *Jackson* made any impact upon the death rows of the States (*Funicello v. New Jersey*, ___ U.S. ___, 29 L.ed.2d 859 (1971), and companion decisions); and *Witherspoon* has been largely avoided by most of the lower courts. (Note, *Jury Selection and the Death Penalty: Witherspoon in the Lower Courts*, 37 U. CHI. L. REV. 759 (1970); Supplemental Brief in Support of Petitions for Writs of Certiorari, in *Mathis v. New Jersey*, ___ U.S. ___, 29 L. ed.2d 855 (1971) [O.T. 1970, No. 5006], and companion cases, Appendix).

many convictions of capital crimes are returned in the United States yearly.[79] But we do know that thirty-six States, the District of Columbia, and the federal jurisdictio all retain on their books statutes of general applicability punishing one or more offenses with death. In some State half a dozen or more crimes may be so punishable.[80] Yet with all this capital armament in the arsenal of a Nation o enormous and burgeoning population, with a growing crim rate and a going crime scare, only a few rare men are sentenced to death and fewer executed.[81] This phenomenon reflects, we suggest, an overwhelming national repulsion against actual use of the penalty of death.[82] Such a repul

[79]The problem and the partial figures available to us are discusse in Appendix F to this brief.

[80]Appendix G to this brief sets out the various federal and state criminal statutes providing for the penalty of death.

[81]See CALIFORNIA ASSEMBLY, REPORT OF THE SUBCOMMITTEE OF THE JUDICIARY COMMITTEE ON CAPITAL PUNISHMENT (1957), 27-28, which comments on the California experience as early as 1955, when the phenomenon we are describing was far le marked than it is today:

> ". . . In that year in California 417 non-negligent homicides were reported; 234 persons were charged with murder in the superior courts; 183 were convicted of murder; 52 were convicted of murder in the first degree; 44 were sentenced to life imprisonment; 8 were sentenced to death; an there were 9 executions, presumably most of them for offens committed in previous years. From all this the proper conception of the law would be not as a snare, but as a sieve."

See also McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 FEDERAL PROBATION (No. 2) 11, 12 (1964).

[82]See Professor Herbert Wechsler, in *Symposium on Capital Punishment*, 7 N.Y.L. FORUM 247, 252-253 (1961):

> "Although the number cannot be determined with precision, no one can doubt that in each of the years involved [1930-1959] with executions ranging from 199 to 48, there were literally thousands of prosecutions that could legally have ended in capital judgment."
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> * * * * *
>
> "The conclusion . . . is inescapable that punishment of death is inflicted in the United States on a bare sample of

sion is all the more striking when one takes into account: (a) that for the past several years the country has undergone one of the most intense of its recurring periods of public agitation about and fear of crime; (b) that for a number of years there have been so few executions as to provide almost no focus for the mobilization of public sentiments against the death penalty;[83] (c) that during these years, and many more before them, American executions have been conducted in secret, their most horrible aspects carefully concealed from public view; (d) that the death penalty is sponsored by the State, publicly approved by State officials,[84] and supported by claims prevalent in law-enforcement quarters[85] (although quite without basis in fact[86]) that the penalty has unique penological values, particularly as a deterrent. It strongly appears, we think, that even under the most favorable conditions for capital punishment—with the vices of the death penalty concealed and its virtues inaccurately extolled—the American conscience has repudiated it hands down.

(8) The concealment, the secrecy, with which we hide away our executions, is doubly significant. First, it gravely inhibits the opportunity for contemporary society to make a

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the culprits whose conduct makes them eligible for its imposition . . . ."

"[T]his experience reveals a deep reluctance in our culture to employ the final sanction . . . ."

See *id.* at 255; Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional,* 83 HARV. L. REV. 1773, 1783-1784 (1970); and see *Witherspoon v. Illinois,* 391 U.S. 510, 521 n. 19 (1968).

[83] See BEDAU 22-23.

[84] "The primary support today for the death penalty comes from law enforcement groups, that is, from the police and from prosecutors." BEDAU 120.

[85] J. Edgar Hoover's several releases on the subject of the death penalty are widely publicized examples of these claims. They are reprinted from the F.B.I. Law Enforcement Bulletin and the Uniform Crime Reports in BEDAU 130.

[86] See note 116 *infra.*

clear-sighted and fully informed judgment upon the acceptability of what is really being perpetrated in its name. We assume that—whatever may be the measure of enlightened public opinion—the constitutional standard does not refer to opinion which is kept in the dark by suppression of the relevant facts.[87] Of course, there are perfectly good and humane reasons for forbidding public executions, as every American jurisdiction now does[88]—reasons which (as we shall shortly see) themselves bespeak eloquently the barbarity of capital punishment in any form. But suppression is nonetheless suppression because inspired by good intentions; and, particularly in determining what is a cruel and unusual punishment within the Eighth Amendment, it can hardly be supposed that the conscience-calming effects of suppression are to be discounted on account of their humanity. Nor

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[87] See Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1783 (1970):

> "Were capital punishment . . . better understood, prevailing moral standards might well condemn it. Indeed, it may be that public approval of the death penalty is dependent upon a hiding away of its grim reality."

[88] The first American State to abolish public executions was Pennsylvania, in 1834 (see Filler, *Movements to Abolish the Death Penalty in the United States*, 284 ANNALS 124, 127 (1952), the year in which also Great Britain abolished gibbeting by 4&5 Will. IV, Ch. 26 §§1, 2. Public execution terminated in England in 1868 (see TUTTLE, THE CRUSADE AGAINST CAPITAL PUNISHMENT IN GREAT BRITAIN (1961), 20); and such executions were progressively outlawed in the United States throughout the nineteenth century. BYE, CAPITAL PUNISHMENT IN THE UNITED STATES (1919), 6. The last public execution in the country seems to have occurred in Kentucky in 1936. BARNES & TEETERS, NEW HORIZONS IN CRIMINOLOGY (3d ed. 1959), 307.

Today, California and every other American jurisdiction, by law or practice, strictly and drastically limit the number of witnesses who may attend an execution. See Cal. Penal Code, § 3605, Appendix A, p. 3a *infra*; Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8, 17 (1952); BEDAU 20-23. Even photographing of executions is ordinarily prohibited. See Carter & Smith, *Count Down for Death*, 15 CRIME & DELINQUENCY 77 (1969); BEDAU 22.

can it be supposed that a punishment is entitled to claim acceptability, as a demonstration of its conformance with enlightened standards of decency, *because* it is so repellant that it forces society to look away and not examine it too closely. In Camus' phrase: "The man who enjoys his coffee while reading that justice has been done would spit it out at the least detail."[89] This is not acceptance, but its opposite.

(9) That leads us to our second point concerning the uniform contemporary practice of secret executions: their concealment itself shows their repugnance of present-day

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[89]CAMUS 187. See KOESTLER & ROLPH, HANGED BY THE NECK (1961), 11-12:

> "You could hardly have a nobler example of the true function of words, namely the partial concealment of fundamentals. The phrase 'capital punishment' itself is a less obvious instance—less obvious because we have got so used to it. It means (in England) dislocating a man's neck by tying a six-foot rope around it and suddenly dropping him through a trap door with his arms and legs tied. If his neck happened not to break—it is certain at least to dislocate—then he would strangle, which takes longer and turns his face dark blue. In either case he often defecates, since people usually want to do this when they are frightened, and the huge shock to his nervous system when the rope tightens removes the last vestige of self-control, together with the social need for it.
>
> "This is not a nice picture and few of us care to be reminded of it. Many of us can think calmly enough of capital punishment, because the phrase embodies what *The Times* would call 'a decent reticence.' The reticence has been growing decently for about a century, beginning in 1868 with the decision to hang people in private instead of making it a public spectacle."

(Lest this description be thought wide of the mark in a country which generally no longer uses the gallows, it should be recalled that the Royal Commission in 1953 recommended that England retain hanging as a means of legal execution, because it was more humane and certain than the American methods. ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT (H.M.S.O. 1953) [Cmd. 8932] [hereafter cited as ROYAL COMMISSION], 246-261, particularly at 256. Concerning the American methods, see Appendix J to this brief.

standards of decency. Repugnance is the only answer to Justice Bok's trenchant question: "Why is the State so ashamed of its process that it must kill at dead of night, in an isolated place, and on an unnamed day?" BOK, STAR WORMWOOD (1959), 197. Notwithstanding that virtually the only argument still made in the twentieth century to support the death penalty is its supposed efficacy as a general deterrent,[90] the men killed for deterrence's sake today are killed clandestinely, out of public view. Camus' forthright analysis of all that this implies is unavoidable:

> "As an example and for the sake of security, it would be wiser, instead of hiding the execution, to hold up the severed head in front of all who are shaving in the morning.
>
> "Nothing of the sort happens. The State disguises executions and keeps silent about these statements and eyewitness accounts [describing the death scene]. Hence it doesn't believe in the exemplary value of the penalty, except by tradition and because it has never bothered to think about the matter . . . A law is applied without being thought out and the condemned die in the name of a theory in which the executioners do not believe. If they believed in it, this would be obvious to all. But publicity not only arouses sadistic instincts with incalculable repercussions eventually leading to another murder; it also runs the risk of provoking revolt and disgust in the public opinion. It would become harder to execute men one after another, as is done in our country today, if those executions were translated into vivid images in the popular imagination . . . . This is why we must approve of the position of Gambetta, who, as an adversary of the death penalty, voted against a bill involving suppression of publicity for executions, declaring: 'If you suppress the horror of the spectacle, if you execute inside prisons, you will

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[90] We consider the bases of this argument in note 116 *infra* and in Appendix H *infra*.

smother the public outburst of revolt that has taken place of late and you will strengthen the death penalty.'

"Indeed, one must kill publicly or confess that one does not feel authorized to kill. If society justifies the death penalty by the necessity of the example, it must justify itself by making the publicity necessary. It must show the executioner's hands each time and force everyone to look at them—the over-delicate citizens and all those who had any responsibility in bringing the executioner into being. Otherwise, society admits that it kills without knowing what it is saying or doing. Or else it admits that such revolting ceremonies can only excite crime or completely upset opinion."[91]

It should be noted that Camus and others who have made the same point[92] are not indulging in the sort of simplistic argument that is sometimes attributed to them. They are not naive enough to assert, and their point does not rest upon the assertion, that a punishment must be publicly

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[91] CAMUS 186-188.

[92] *E.g.*, LAWES, LIFE AND DEATH IN SING SING (1928), 153-154; Ancel, *The Problem of the Death Penalty*, in SELLIN (1967), 3, 15-16; MENNINGER, THE VITAL BALANCE (1963), 219:

> "We cannot close our chamber of horrors without mention of the epitome of aggression in a civilized society, the imposition of capital punishment, mercifully unseen by the public or by those who order it. While the main argument for the retention of capital punishment is its deterrent effect, it is ironic that it is almost impossible for anyone to be admitted to an execution in order to experience its deterrent effect at close range. This argument would logically demand that executions be open to the public, or at least be broadcast on radio and television like other spectacles. Instead, they are carried out in almost complete secrecy, usually in the middle of the night. This furtiveness suggests some awareness that the social climate has shifted to such a degree that the community at large would not tolerate capital punishment if it could actually see its official representatives taking the lives of inadequate and often obviously disorganized individuals."

exhibited in order to deter. Nor do they deny that there can be degrees of deterrence, and that society may rationally choose the diminished degree that is involved in private infliction of a punishment whose public exhibition would have untoward effects. Allowing the legitimacy of that choice, they ask only what the choice made by our modern society in regard to capital punishment indicates.

Plainly the decision to use capital punishment at all today indicates both the belief that it is a superior deterrent to even life imprisonment, and the desire to maximize the deterrent power of the law in regard to the offenses for which the extreme penalty is prescribed. From a deterrent point of view, the fact "[t]hat capital punishment is horrible and cruel is the reason for its existence."[93] A society which uses a punishment of that sort with the aim of maximizing deterrence can scarcely be expected to depreciate its deterrent force by hiding it—particularly in light of its centuries-old tradition of public executions[94]—unless there is some very strong countervailing force. What then is that force? Can there be any doubt at all that it is the force of decency?

We hide our executions because we are disgusted to look at them, because the view of them would make men sick. We hide them because their public display would render them unacceptable and flout the dignity of man. Could this Court today sustain a *public* execution as consistent with the Eighth Amendment? No consideration that is urged to support closeted executions would be lacking in

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[93] Darrow, *A Comment on Capital Punishment*, in LAURENCE, A HISTORY OF CAPITAL PUNISHMENT (1960), xv, xvii. See CALVERT, CAPITAL PUNISHMENT IN THE TWENTIETH CENTURY (1927), 3:

> "Those who believe in hanging, frankly confess it to be a horrible and revolting practice. They maintain, however, that it is necessary in order to protect society."

[94] TEETERS & HEDBLOM, HANG BY THE NECK (1967), 19-46; BEDAU 2, 20-22. See note 58 *supra*, and the works cited therein.

the case of a public one; and to the condemned man it would make relatively little difference. The one way of killing a human being is not more cruel to him than the other, although it is intolerably more cruel to us. This surely is because

> "if people were to witness the decay of the waiting man, to hear his cries and watch his final struggles, they would be affronted in their consciences, and in their standards of humanity and of human dignity and decency. Our systematic concealment of executions creates a strong inference that capital punishment now falls under our expanded definition of 'cruelty,' particularly when we contrast this present custom of secrecy with the one-time public display of executions."[95]

(10) We have said that secret executions both demonstrate the general unacceptability of killing as a penalty for crime in contemporary America and provide the necessary basis for such slight and uninformed acceptance as it has. The same is true of the rarity of executions. We have already discussed the first of these two aspects of the virtual cessation of American executions during the past several decades (pp. 39-43, *supra*); and we return now to the second.

Almost forty years ago, Warden Lawes made the point that the maintenance of capital legislation on the statute books depends upon its unenforcement.[96] It is, of course, a matter of history, recognized by this Court in *McGautha v. California*, 402 U.S. 183 (1971), that public acceptabi-

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[95]Gottlieb, *Capital Punishment*, 15 CRIME & DELINQUENCY 1, 6 (1969).

[96]LAWES, TWENTY THOUSAND YEARS IN SING SING (1932), 306-307:

> "'What would be the attitude of the American people if by good or ill circumstance the ten thousand men and women who in any one year commit our murders and manslaughters in these United States, would all be convicted of murder, sentenced to death, and that punishment actually inflicted?' What, indeed, but an almost universal cry for abolition?"

lity of the death penalty in this country in this century has been secured only by replacing mandatory capital penalties with statutes allowing jury and court discretion in capital sentencing.[97] These statutes, combined with the prosecutorial discretion at the outset of a capital case and the executive's commutative power at the end of it, allow a "small and capricious selection of offenders [to be] . . . put to death."[98] "Public awareness diminishes as the frequency of imposing the penalty decreases, and legislative action is not likely to be prompted when the consequences befall only a few prisoners." *Ralph v. Warden*, 438 F.2d 786, 792 (4th Cir. 1970).

(11) It is important also to note the identity of the prisoners upon whom the consequences fall. *Whose* killings today does society accept, when it accepts any? Former Governor Michael DiSalle of Ohio has answered this question.

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[97] There are very few crimes in the United States today which carry a mandatory death penalty, and those few are for the most part of the obscure sort under which no one is ever charged (treason, in several States; perjury in a capital case, etc.) See BEDAU 48-52. And see Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8 (1952); Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099 (1953). Outside the United States, also, mandatory capital punishment is rapidly being replaced by grants of discretion. UNITED NATIONS 13, 82, 87.

[98] Statement of Attorney General Ramsey Clark, in *Hearings*, at 93:

> "A small and capricious selection of offenders have been put to death. Most persons convicted of the same crimes have been imprisoned only. Experienced wardens know many prisoners serving life or less whose crimes were equally, or more atrocious, than those of the men on death row."

Accord: LAWES, TWENTY THOUSAND YEARS IN SING SING (1932), 302, 307-310; DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN (1962), 254-255; Testimony of Clinton J. Duffy, in *Hearings*, at 24-25; De Ment, *A Plea for the Condemned*, 29 ALA. LAWYER 440, 440-441 n. 2 (1968) (quoting A. Frank Lee, Commissioner, Alabama Board of Corrections). And see BEDAU 410-411.

> ". . . Generally they have one thing in common, they are penniless, of low mental capacity, with little or no education, and have few friends. The fact that they have no money is of particular import in their being condemned to death . . . . It is the poor, the illiterate, the underprivileged, the member of the minority group, who is usually sacrificed by society's lack of concern."[99]

The same point has been made repeatedly by knowledgeable observers. Those who are selected to die are the poor and powerless, personally ugly and socially unacceptable.[100] In disproportionate percentages, they are also black. Racial discrimination is strongly suggested by the national execu-

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[99] DiSalle, *Trends in the Abolition of Capital Punishment*, 1 U. TOLEDO L. REV. 1, 12-13 (1969). See also DiSalle, *Comments on Capital Punishment and Clemency*, 25 OHIO ST. L.J. 71, 72 (1964); and Governor DiSalle's testimony, in *Hearings*, at 11-12.

[100] "It is the poor, the sick, the ignorant, the powerless and the hated who are executed." CLARK, CRIME IN AMERICA (1970), 335. See DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN (1962), 256-257; LAWES, TWENTY THOUSAND YEARS IN SING SING (1932), 302; LAWES, LIFE AND DEATH IN SING SING (1928), 155; WEIHOFEN 164-165; West, *Medicine and Capital Punishment*, in *Hearings*, at 124, 125; McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 FED. PROBATION (No. 2), 11, 12 (1964).

The characteristics of the inmates of death row are described in Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1 (1964); Bedau, *Capital Punishment in Oregon, 1903-1964*, 45 ORE. L. REV. 1 (1965); Carter & Smith, *The Death Penalty in California:* A Statistical and Composite Portrait, 15 CRIME & DELINQUENCY 62 (1969); Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165 (1957); Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 CRIME & DELINQUENCY 132 (1969). And see Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, as *Amici Curiae*, in *Boykin v. Alabama*, 395 U.S. 238 (1969) [O.T. 1968, No. 642], p. 7 n. 8.

A discussion of the selective forces that operate at the penalty-trial stage of California capital cases is found in Note, *A Study of the California Penalty Jury in First-Degree-Murder Cases*, 21 STAN. L. REV. 1297 (1969).

tion figures;[101] it has been borne out in a number of discrete and limited but carefully done studies;[102] and it has seemed apparent to responsible commissions and individuals studying the administration of the death penalty in this country.[103] Assuredly, the proof of discrimination is

[101] The following are the total number of persons executed between 1930 and 1967 (3,859), broken down by offense and race, as they appear in NPS (1968), p. 7:

	Murder	Rape	Other	Total
White	1664 (49.9%)	48 (10.5%)	39 (55.7%)	1751 (45.4%)
Negro	1630 (48.9%)	405 (89.1%)	31 (44.3%)	2066 (53.5%)
Other	40 (1.2%)	2 (0.4%)	0 (0.0%)	42 (1.1%)
	3334 (100%)	455 (100%)	70 (100%)	3859 (100%)

[102] Johnson, *The Negro and Crime*, 217 ANNALS 93 (1941); Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 27 SOCIAL FORCES 369 (1949); Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165 (1957); Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L., CRIM. & POL. SCI. 301 (1962); Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 18-21, 52-53 (1964). The Stanford Law Review Note cited in note 100 *supra* does not find racial discrimination by California juries at the penalty stage of jury-tried cases. Whether discrimination affects earlier or later stages in the process of selecting the men condemned to die is not revealed in the existing literature. Whether by reason of race or of economic and social factors correlated with race, whites committed to death row in the United States have traditionally escaped the actual infliction of the death penalty in significantly greater proportions than Negroes. See the studies cited *supra;* MANGUM, THE LEGAL STATUS OF THE NEGRO (1940), 369-370; and see McCafferty, *The Death Sentence, 1960*, in BEDAU 90, 95-96.

[103] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967) 143; PENNSYLVANIA, JOINT LEGISLATIVE COMMITTEE ON CAPITAL PUNISHMENT, REPORT (1961) 14-15; UNITED NATIONS 32, 98; BEDAU 411-413; CLARK, CRIME IN AMERICA (1970), 335; MATTICK 5, 17; WOLFGANG & COHEN, CRIME AND RACE: CONCEPTIONS AND MISCONCEPTIONS (1970), 77, 80-81, 85-86; Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8, 14-17 (1952); Bedau, *A Social Philosopher Looks at the Death Penalty*, 123 AM. J. PSYCHIATRY

stronger in rape than in murder cases;[104] and, in any case, an irrefutable statistical showing that a particular State has violated the Equal Protection of the Laws by consistent racial inequality in the administration of the death penalty is difficult to establish.[105] This is so principally because the total number of death sentences is so exceedingly small in comparison to the number of factors which prosecuting officials, sentencing judges and juries, correctional officials and physicians, and commutative authorities may consider in the exercise of the many selective judgments which finally determine who shall live or die.

Where the occurrence of any phenomenon is rare and the factors that may cause it to occur are unlimited, neither statistics nor any other analytical tool can provide a surefire test for the detection of racial bias among those factors. Thus, a State can discriminate racially and not get caught at it if it kills men only sporadically, not too often, by being arbitrary in selecting the victims of discrimination. Or, to put the matter another way, if a State invokes a particular penalty sufficiently rarely so that no regular pattern of its use develops, the State *may* be acting discriminatorily; it *likely will* be acting in a fashion such that the penalty falls most harshly on the poor and disadvantaged; but it *surely will* be acting in a way that escapes the safeguards of the Constitution, unless the Eighth Amendment forbids. Equal Protection and Due Process provide no judicially usable devices to protect the individual from the arbitrariness of the freakishly rare, harsh penalty.[106] This is all the more

1361, 1362 (1967); and see Rubin, *Disparity and Equality of Sentences–A Constitutional Challenge*, 40 F.R.D. 55, 66-68 (1967).

[104] See Brief for Petitioner, *Jackson v. Georgia*, O.T. 1971, No. 69-5030.

[105] See *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968), *vacated on other grounds*, 398 U.S. 262 (1970).

[106] It has elsewhere been argued unsuccessfully that they do. *McGautha v. California*, 402 U.S. 183 (1971); *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968), *vacated on other grounds*, 398 U.S. 262 (1970).

reason, we believe, for application of the constitutional guarantee against cruel and unusual punishments.

(12) But there are other consequences, as well, of the freakishly rare use of a harsh criminal penalty. We have pointed out above that such use escapes not only meaningful control under the constitutional guarantees of Equal Protection and Due Process; it escapes also the fair scrutiny of public conscience, with its attendant pressure to keep the legislature acting decently. A public can easily bear the rare, random occurrence of a punishment which, if applied regularly, would make the common gorge rise. It seems to us that this is just the kind of penalty at which a prohibition of cruel and unusual punishments must aim. Whether it happen by accident or design that penalties of this sort fall most furiously upon the poor and friendless and upon racial minorities, the supposed "acceptance" of the penalty is nonetheless a product of the outcast nature of those who bear the brunt of it. As rarely as we tolerate the infliction of the death penalty today, we still more rarely tolerate its infliction upon *us*.

That the death penalty is rare and unusual permits public and political acceptance of its cruelty, but, for that very reason, requires judicial condemnation under the Eighth Amendment. Rare and uneven usage which evades the public conscience politically demands the supervision by the public conscience, speaking through the courts, which the Eighth Amendment promises. This is the more true because, we think such usage itself affronts "the dignity of man," *Trop v. Dulles, supra,* and those cherished principles of fair and regular, nonarbitrary treatment of the citizen which the Eighth Amendment, no less than the Fourteenth, supposes.

> "[T]he issue . . . is not . . . whether it is fair or just that one who takes another person's life should lose his own. Whatever you think about that proposition it is clear that we do not and cannot act upon it generally in the administration of the penal law. The problem rather is whether a small and

highly random sample of people who commit murder or other comparably serious offenses ought to be despatched, while most of those convicted of such crimes are dealt with by imprisonment."[107]

(13) The reasons why our society is no longer willing generally to act upon the penal principle of a life for a life are, in part, pragmatic. The primary pragmatic consideration of this sort is, of course, our modern development of large-scale penal and correctional institutions which we must maintain whether or not we use them for "capital" criminals, and into which we can now also place our "capital" criminals if we choose.[108] But it is not the mere availability of

[107] Professor Wechsler, in *Symposium on Capital Punishment*, 7 N.Y.L. FORUM 247, 255 (1961). See also Sellin, *The Inevitable End of Capital Punishment*, in SELLIN (1967), 239, 243: "[I]f we conservatively assume that there are now about 2500 capital murders annually in the United States and but seven executions, it is obvious that a life for a life is rarely taken."

[108] See Bedau, *The Courts, The Constitution, and Capital Punishment*, [1968] UTAH L. REV. 201, 232:

> "In 1790, when the eighth amendment was adopted (and even more so in earlier centuries, when 'cruel and unusual punishments' were first prohibited in England) only two types of punishment were available to cope with serious offenses: death (with or without aggravations) and banishment, or 'transportation,' to the colonies or some other remote and relatively uninhabited region. Imprisonment, as something more than a mode of temporary detention prior to trial or as punishment for a minor offense, was entirely unknown at the time anywhere in Europe or America. How could anyone in 1790 sensibly have demanded that the 'evolving standards of decency' required there and then imprisonment rather than death for felons? There were no prisons, no trained custodial and administrative officers, no parole system, no statutes to authorize creating any of these, no public disposition to obtain them—in short, none of the attitudes, facilities and personnel obviously necessary to run a system of long term incarceration. Today, of course, banishment is no alternative at all. Instead, imprisonment is an entirely commonplace practice and a viable alternative to banishment and death for every serious crime. However inhumane and brutal imprisonment may be (and there is no doubt that in practice it often is), involuntary incarceration under close

this alternative to the penalty of death that has made our society choose overwhelmingly to use it and to reject capital punishment. It is the profound appreciation that, once we have developed an alternative,[109] it would be intolerably cruel not to use it.[110]

We have focused our argument in this brief upon the word "unusual" in the Eighth Amendment rather than upon the word "cruel." That is because, as we read this Court's prior decisions,[111] they have not denied the cruelty of the death penalty, but have assumed its constitutionality as not "unusual." Plainly, the death penalty is cruel. Even if it involved no more than the calculated and deliberate extermination of a human life it would be cruel. "The killing of a helpless captive is a brutally degrading experience. If those alone who have participated in an execution could

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supervision may still be a *necessary* 'cruelty' in most cases involving the commission of violent crimes. The undeniably greater severity of death as a punishment over imprisonment is, *ceteris paribus*, sufficient by itself to establish its greater cruelty."

[109] In note 116 *infra*, we discuss very briefly the consideration that are relevant to a rational choice between the alternatives of death and imprisonment as penalties for violent crimes. That discussion is immaterial here, because we could not possibly assert that the considerations canvassed in note 116 control the decisions of prosecutors, juries, judges, governors and others which, in fact, determine use of one penalty or the other. Our point here is simply the descriptive one that each of these decisions today is made with the knowledge that prison is an available alternative, in the sense that it is there if the decider should decide to use it.

[110] See CLARK, CRIME IN AMERICA (1970), 336-337:

> ". . . There were times when self-preservation may have necessitated [the] . . . imposition [of the death penalty]. Later, when food, clothing and shelter were scarce and often insufficient, inordinate sacrifices by the innocent would have been required to isolate dangerous persons from the public. Our civilization has no such excuse."

[111] See note 9 *supra*.

vote on the death penalty, it would be abolished tomorrow."[112] But more is involved. Uniquely among punishments, a death sentence inflicts upon the condemned man "a fate of ever-increasing fear and distress."[113] [114] "The devastat-

[112] West, *Medicine and Capital Punishment*, in *Hearings*, at 125. As previously in briefing the Eighth Amendment question in this Court, the problem of presenting the reality of a punishment of death has given us great trouble. In the Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, as *Amici Curiae*, in *Boykin v. Alabama*, 395 U.S. 238 (1969) [O.T. 1968, No. 642], pp. 29-30, we explained why we there decided against providing the Court with published descriptions of the commonly used American methods of execution: "[A]s we prepared the materials for the appendix, we realized that their inclusion here would certainly cause us to be charged with sensationalism and an appeal to passion and repulsion. Such is the character of this institution of killing men that it forces one who attacks it legally either to describe with particularity what he is attacking, and be bitterly resented, or to keep silent about it, and risk being misunderstood. Finally, we have decided to join in the general "decent reticence," and to do no more than provide the Court with citations to descriptions of the methods of executions."

In the present case, we have decided the matter the other way, after much reflection in light of our different responsibilities here. Appendix I to this brief sets forth some of the accurate and responsible descriptions of executions by electricity and hydrocyanic gas.

[113] *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (plurality opinion of Chief Justice Warren). See *Weems v. United States*, 217 U.S. 349, 372 (1910): "[I]t must have come to [the Framers of the Eighth Amendment] . . . that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation."

[114] Dostoevsky, who was himself condemned to die and reprieved only shortly before his scheduled execution, gives this description:

> "But the chief and the worst pain may not be in the bodily suffering but in one's knowing for certain that in an hour, and then in ten minutes, and then in half a minute, and then now, at the very moment, the soul will leave the body and that one will cease to be a man and that that's bound to happen; the worst part of it is that it's *certain*. When you lay your head down under the knife and hear the knife slide over your head, that quarter of a second is the most terrible of all." DOSTOEVSKY, THE IDIOT (Modern Library, 1935), 20 (original emphasis).

ing, degrading fear that is imposed on the condemned for months or years is a punishment more terrible than death . . . ."[115]

(14) It is important, finally, that such rare and unusual use as American society makes of the death penalty today deprives it of any functional place in the rational scheme of a state's penal law. Harsh punishments used in this manner cease to be instruments of public justice or of reasoned penal policy, and hence cease to have any claim to legitimacy that might be set off against the commands of the Eighth Amendment. Capital punishment generally can be shown to have no particular efficacy, in achieving the legitimate aims of the criminal law, that less harsh penalties do not have.[116] But whatever claims of penological efficacy

[115]CAMUS 200. See also *id.* at 199:

> "[In considering the argument from *lex talionis*] let us leave aside the fact that the law of retaliation is inapplicable and that it would seem just as excessive to punish the incindiary by setting fire to his house as it would be insufficient to punish the thief by deducting from his bank account a sum equal to his theft. Let us admit that it is just and necessary to compensate for the murder of the victim by the death of the murderer. But beheading is not simply death. It is just as different, in essence, from the privation of life, as a concentration camp is from prison. It is a murder, to be sure, and one that arithmetically pays for the murder committed. But it adds to death a rule, a public premeditation known to the future victim, an organization, in short, which is itself a source of moral sufferings more terrible than death. Hence there is no equivalence. Many laws consider a premeditated crime more serious than a crime of pure violence. But what then is capital punishment but the most premeditated of murders, to which no criminal's deed, however calculated it may be, can be compared? For there to be an equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life."

[116]The aims of the criminal law are generally stated to be (1) retribution, (2) moral reinforcement or reprobation, (3) isolation, reformation, rehabilitation of the offender, and (4) deterrence. To these may be added: (5) the achievement of the first four aims efficiently and economically.

might be made for the death penalty if it were generally, regularly, fairly and even-handedly applied as a punishment

(1) Although "[m]odern penological thought discounts retribution in the sense of vengeance" [ROYAL COMMISSION 17), nothing in our submission requires the Court to consider whether the States can constitutionally pursue that aim. *Cf. Powell v. Texas*, 392 U.S. 514, 530 (1968). This is so for two reasons. First, the death penalty as it is used today—to kill an arbitrarily selected handful of America's thousands of convicted murderers—is not even supportable by the rationale of retribution. See note 107 *supra*, and accompanying text. "Experienced wardens know many prisoners serving life or less whose crimes were equally, or more atrocious, than those of the men on death row." Statement of Attorney General Ramsey Clark, in *Hearings*, at 93. See LAWES, TWENTY THOUSAND YEARS IN SING SING (1932), 302, 307-310; DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN (1962), 254-255; Testimony of Clinton T. Duffy, in *Hearings*, at 24. Second, no assessment of the *degree* of punishment necessary to effect retribution can be rationally made. Therefore, it cannot be asserted that any particular penalty is more supportable by retributive purposes than any other.

(2) Moral reinforcement or reprobation doubtless requires that the most serious crimes be punished most seriously. But, obviously, "Grading punishments according to the severity of the crime does not require that the upper limit of severity be the death penalty." BEDAU 268. The reprobation function, therefore, hardly needs or warrants capital punishment. See Ancel, *The Problem of the Death Penalty*, in SELLIN, CAPITAL PUNISHMENT (1967) 3, 16-17, 19.

(3) "[R]eformation . . . can have no application where the death penalty is exacted." ROYAL COMMISSION 18. As for isolation, the evidence is clear and overwhelming that, for no class of criminals, is death required to render them socially safe. Lesser alternatives are ample. SELLIN (1959) 69-79; KOESTLER 144-152; BEDAU 395-405; Bedau, *Death Sentences in New Jersey 1907-1960*, 19 Rutgers L. Rev. 1, 47 (1964).

(4) As for deterrence, there is simply no evidence—despite the most exhaustive inquiry into the subject—that the death penalty is a superior deterrent to lesser punishments. We discuss the evidence in Appendix H to this brief; and see SELLIN (1959), 19-63; SELLIN (1967), 135-186, 244-253; MATTICK 8028; KOESTLER 48-61, 171-178; CALVERT, CAPITAL PUNISHMENT IN THE TWENTIETH CENTURY (3d ed. 1928), 51-90; BEDAU 214, 258-343; Bedau, *A Social Philosopher Looks at the Death Penalty*, 123 AM. J. PSYCHIATRY 1361, 1362 (1967); Hook, *The Death Sentence*, in BEDAU 146,

for crime, surely vanish when it is applied as the United States now applies it—rarely, irregularly, unfairly and un-

147-148, 151. A few law enforcement officials and other who support the death penalty sometimes appear to argue that this proposition is factually debatable. It is not, as more candid proponents of capital punishment admit. "It is generally agreed between the retentionists and abolitionlists, whatever their opinions about the validity of comparative studies of deterrence, that the data which now exist show no correlation between the existence of capital punishment and lower rates of capital crime." UNITED NATIONS 123. Every serious inquiry into the death penalty has accepted this conclusion. UNITED NATIONS 55-58, 115-119; ROYAL COMMISSION 18-24, 58-59, 328-380; CEYLON, SESSIONAL PAPER XIV-1959, REPORT OF THE COMMISSION OF INQUIRY ON CAPITAL PUNISHMENT (1959), 42-52; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967), 143; CALIFORNIA ASSEMBLY, REPORT OF THE SUBCOMMITTEE OF THE JUDICIARY COMMITTEE ON CAPITAL PUNISHMENT (1957), 27-30; NEW YORK STATE, TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, SPECIAL REPORT ON CAPITAL PUNISHMENT (1965), 2; PENNSYLVANIA JOINT LEGISLATIVE COMMITTEE ON CAPITAL PUNISHMENT, REPORT (1961), 9, 20-29; FAVREAU 36-37; and see the debates collected in SELLIN (1967), 55-104, and in FAVEREAU, *passim*.

Significantly, wherever serious official inquiries have found some support for the thesis that capital punishment may have greater deterrent efficacy than imprisonment, that support has been found in the impressionistic opinions of police, prosecutors and other law enforcement officials, unsustained by objective evidence. See CANADA, JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON CAPITAL PUNISHMENT, REPORT (1956), paras. 29-33, 43-50; NEW JERSEY, COMMISSION TO STUDY CAPITAL PUNISHMENT, REPORT (1964), 8-10; FAVREAU 4, 23. The Royal Commission also gave some weight to such impressionistic opinions, while explicitly recognizing that there was no objective evidence behind them. ROYAL COMMISSION 18-24. Interestingly, corrections personnel appear very preponderately to believe that capital punishment has no particular deterrent efficacy. DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN (1962), 257; Testimony of Clinton T. Duffy, in *Hearings* 22-23; Thomas, *Attitudes of Wardens Toward the Death Penalty*, in BEDAU 242. And see National Council on Crime & Delinquency, Board of Trustees, *Policy Statement on Capital Punishment*, 10 CRIME & DELINQUENCY 105 (1964).

evenly—to execute a few stray men out of a "capital" criminal population of thousands.[117]

(15) The conclusion is inescapable, we think, that this rare penalty, inflicted upon the smallest handful of murderers, is no part of the regular criminal-law machinery of California or of any other State. It is a freakish aberration, a random extreme act of violence, visibly arbitrary and discriminatory—a penalty reserved for unusual application because, if it were usually used, it would affront universally shared standards of public decency. Such a penalty—not Law, but Terror—has no place in a democratic government. It is a cruel and unusual punishment, forbidden by the Eighth Amendment.

CONCLUSION

Trop v. Dulles said in 1958 that the death penalty could not be constitutionally condemned "in a day when it is still widely accepted."[118] In the same year, Justice Barry wrote:

> "The time when nations will cease to execute spies and traitors will not be seen while wars, hot or cold,

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(5) Finally, there seems no doubt that today capital punishment is more costly economically than the alternative of imprisonment, even for life. McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 FEDERAL PROBATION (No. 2) 11, 13-14 (1964); MacNamara, *Statement Against Capital Punishment*, in BEDAU 182, 192-193; West, *Medicine and Capital Punishment*, in *Hearings*, at 125; Testimony of Clinton T. Duffy, in *Hearings*, at 25-26. There is no need to document its other baneful effects on the administration of justice, which are commonplaces. *E.g.*, FRANKFURTER, OF LAW AND MEN (1956), 81, 84-85.

[117]WEIHOFEN 159-160, 163-164; LAWES, LIFE AND DEATH IN SING SING (1928), 154-155; PLAYFAIR & SINGTON, THE OFFENDERS (1957), 231; CALIFORNIA ASSEMBLY, REPORT OF THE SUBCOMMITTEE OF THE JUDICIARY COMMITTEE ON CAPITAL PUNISHMENT (1957), 27.

[118]*Trop v. Dulles*, 356 U.S. 86, 99 (1958) (plurality opinion of Chief Justice Warren).

inflame national passions and create a climate of fear and hatred. But plainly the distaste for death as a punishment for crimes that affect the individual and only indirectly the State is growing more general, and the complete abandonment of capital punishment as a feature of the criminal law is not far distant."[119]

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[119] Barry, *Hanged by the Neck Until . . .*, 2 SYDNEY L. REV. 401, 411 (1958).

The time foreseen by Justice Barry, and to which this Court in *Trop* deferred, has come. The Court should now reverse Earnest Aikens' sentence of death.[120]

Respectfully submitted,

JACK GREENBERG
JAMES M. NABIT, III
CHARLES STEPHEN RALSTON
JACK HIMMELSTEIN

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[120]Throughout this brief, we have relied upon only such factual assertions (regarding the rarity of the death penalty, its uneven application, and its harshness) as we believe that this Court can judicially notice. Those facts, however, are a small part of the factual evidence which condemns the death penalty as a cruel and unusual punishment. Counsel for petitioner have repeatedly sought evidentiary hearings in the courts of California and elsewhere at which they might prove all of the relevant facts through "the sharp legal and evidentiary clash between fully prepared adversary litigants which is traditionally expected in major constitutional cases." *Powell v. Texas*, 392 U.S. 514, 522 (1968). Such a hearing has been repeatedly refused. See, e.g., Petition for a Writ of Certiorari, in *Anderson et al. v. California*, O.T. 1968, No. 1643 Misc. [now O.T. 1971, No. 68-5007], pp. 22-30; Petition for a Writ of Certiorari, in *Forcella v. New Jersey*, O.T. 1968, No. 947 Misc. [decided sub nom. *Funicello v. New Jersey*, ___ U.S. ___, 29 L.ed.2d 859 (1971)], pp. 76-89.

We believe, for the reasons stated in this brief, that the death penalty is a constitutionally prohibited cruel and unusual punishment upon the judicially noticeable facts. But, should this Court conclude that further factual information is necessary or appropriate for disposition of the Eighth Amendment issue, it would appear proper to remand the present case to the California Supreme Court. That Court's decision of the Eighth Amendment question herein was based exclusively upon its decision in the Anderson case, see p. 6 *supra*; and if *Anderson* rests upon a basis that is inadequate to support proper constitutional adjudication, the present decision of the California Supreme Court is infirm. On the other hand, there are admitted procedural differences between the present direct appeal and the habeas corpus proceeding in *Anderson*; and the certiorari petition there raises the specific question whether a death-sentenced man is entitled to an evidentiary hearing upon specific proffers of proof going to Eighth Amendment questions.

ELIZABETH B. DuBOIS
JEFFRY A. MINTZ
ELAINE R. JONES
LYNN WALKER
ANN WAGNER
10 Columbus Circle, Suite 2030
New York, New York 10019

JERRY A. GREEN
273 Page Street, Suite 711
San Francisco, California 94102

JEROME B. FALK, JR.
650 California Street, Suite 2920
San Francisco, California 94108

PAUL N. HALVONIK
593 Market Street
San Francisco, California 94105

MICHAEL MELTSNER
Columbia University Law School
435 West 116th Street
New York, New York 10027

ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305

APPENDICES

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APPENDIX A

STATUTORY PROVISIONS INVOLVED

Cal. Penal Code, § 187
(West, 1970)
as it read prior to September 17, 1970

§187. Murder defined

Murder Defined. Murder is the unlawful killing of a human being, with malice aforethought.

Cal. Penal Code, § 188
(West, 1970)

§188. Malice, express malice, and implied malice defined

Malice Defined. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

Cal. Penal Code, § 189
(West, 1970)
as it read prior to August 23, 1969

§189. Murder; degrees

All murder which is perpetrated by means of poison, lying in wait, torture, or by any other kind of willful, deliberate, and premediated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree.

Cal. Penal Code, § 190
(West, 1970)

§190. Murder; punishment; discretion of jury

Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at

the discretion of the court or jury trying the same, and the matter of punishment shall be determined as provided in Section 190.1, and every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life.

Cal. Penal Code, § 190.1
(West, 1970)

§ 190.1. Sentences of death or imprisonment for life; determination; minors under 18

The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, and has been found sane on any plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of proof as to the age of said person shall be upon the defendant.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived. If the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharged that jury in which case a new jury shall be drawn to determine the issue of penalty.

In any case in which defendant has been found guilty by a jury, and the same or another jury, trying the issue of penalty, is unable to reach a unanimous verdict on the issue of penalty, the court shall dismiss the jury and either impose the punishment for life in lieu of ordering a new trial on the issue of penalty, or order a new jury impaneled to try the issue of penalty, but the issue of guilt shall not be retried by such jury.

Cal. Penal Code, § 3604
(West, 1970)

§ 3604. Method of execution; lethal gas

The punishment of death shall be inflicted by the administration of a lethal gas.

Cal. Penal Code, § 3605
(West, 1970)

§ 3605. Witnesses to execution; selection; exclusion of minors

The warden of the State prison where the execution is to take place must be present at the execution and must invite the presence of two physicians, the Attorney General of the State, and at least 12 reputable citizens, to be selected by him; and he shall at the request of the defendant, permit such ministers of the Gospel, not exceeding two, as the defendant may name, and any persons, relatives or friends, not to exceed five, to be present at the execution, together with such peace officers as he may think expedient, to witness the execution. But no other persons than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness the same.

Cal. Penal Code, § 187
(West, 1971 Cum. pocket part)
as amended September 17, 1970

§ 187. Murder defined; death of fetus

(a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

[Subsections (b) and (c) relate to the killing of a fetus.]

Cal. Penal Code, § 189
(West, 1971 Cum. pocket part)
as amended August 19, 1970[1a]

§ 189. Murder; degrees

All murder which is perpetrated by means of a destructive device or explosive, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premediated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree.

As used in this section, "destructive device" shall mean any destructive device as defined in Section 12301, and "explosive" shall mean any explosive as defined in Section 12000 of the Health and Safety Code.

[1a]The statute as it read between August 23, 1969 (see Cal. Penal Code § 189, p. 1a *supra*) and August 19, 1970, contained the word "bomb" where the 1970 version has "destructive device or explosive"; and its second paragraph defined "bomb."

APPENDIX B

SUMMARY OF THE EVIDENCE RELATING TO THE KILLINGS OF MRS. EATON AND MRS. DODD

On January 31, 1966, following a protracted trial (TR. 3371),[1b] a judge of the Superior Court of Ventura County, California, convicted Petitioner Earnest James Aikens, Jr., a Negro (Tr. 2850), then twenty years old (Tr. A 91-92) of the first-degree murder of Mrs. Mary Winifred Eaton, a white woman (Tr . 2860). The court's remarks upon conviction are at Tr. 3372-3419. On March 21, 1966, following a protracted penalty trial (Tr. 3422-3419), the court sentenced him to death for this offense. Its remarks upon the sentence are at Tr. 4890-4992.

In a proceeding consolidated for trial, the judge also convicted petitioner of the first-degree murder of another white woman (Tr. 2860), twenty-five-year-old Mrs. Kathleen Nell Dodd (Tr. 2882), and fixed the penalty at life imprisonment in accordance with California law (Cal. Penal Code § 190.1), which prohibits imposition of the death penalty on any person who was under eighteen years of age when the murder was committed. Petitioner was just under seventeen when Mrs. Dodd was murdered on the night of April 3-4, 1962; he was twenty when Mrs. Eaton was murdered on April 26, 1965. (Tr. A 91-92)

At the penalty trial following petitioner's conviction on the charge of killing Mrs. Eaton, the prosecution introduced evidence that petitioner had also murdered Mr. Clyde J. Hardaway, a Negro man in his forties (Tr. 3424), on June 7, 1962, and forcibly raped a fifteen-year-old Negro girl (Tr. 4250, 4277), Dorthy Ann Piggee, on December 25, 1962.

[1b]The trial transcript (Reporter's Transcript) is in twenty volumes, including the guilt and penalty trials, and is cited herein as Tr.____. There is a one-volume Reporter's Transcript of pretrial proceedings, designated Volume A, cited herein as Tr. A ____. There is also a two-volume Clerk's Transcript in the Eaton matter (Cr. 5527) [cited 5507 R.____], and a one-volume Clerk's Transcript in the Dodd matter (Cr. 5705) [cited 5705 R.____], both of which contain exhibit indices to the trial.

Additional evidence of petitioner's repeated criminal activities appears throughout the record of the penalty trial, and is summarized in the court's finding set forth at p. 3-4 of the body of this brief.

Petitioner was indicted for the Eaton murder four days thereafter, on April 30, 1965 (5527 R. 1); and he was indicted for the Dodd murder August 13, 1965 (5705 R. 1), three years and four months after the date of the crime. Petitioner pleaded not guilty to each charge (Tr. A 38, 121), consented to the prosecutor's motion to consolidate the two trials (Tr. A 122), and waived trial by jury (Tr. A 168-175, 185-189; Tr. 3-4).

The prosecutor presented and argued both murders principally on the felony-murder theory, and the judge found that each killing occurred in the course of the commission of the felonies of burglary and/or robbery, and rape. (Tr. 3419). The prosecutor also argued, and the judge found, that premeditation could be inferred from the manner and circumstances of the murders. (Tr. 3419.) The prosecutor advanced other similarities which linked the murders to each other, and thus, he argued, to petitioner—including the fact that both victims lived within a short distance of petitioner's residence; the home of neither was entered forcibly; and each was killed with a knife from her own kitchen.

The proof concerning each murder was circumstantial including inconsistent various admissions and statements made by petitioner to fellow inmates and to authorities. Petitioner did not testify.

A. The Eaton Killing

The circumstances surrounding the Eaton murder were as follows:

Mrs. Mary Winifred Eaton lived with her husband, Frank Eaton, her adopted children, Eddie Eaton and Susan Mann, and her son-in-law, David Mann (Tr. 1741), at 396 South Santa Cruz St., Ventura, California, the north-east corner

house at Ocean Avenue, which runs east-west. On the day of her death, April 26, 1965, Mrs. Eaton had breakfast with her husband and her children at about 7:15 a.m. (Tr. 1770, 1741, 1806), then helped Eddie move furniture in the hall (Tr. 1806), so that she could work later at waxing floors, as she told Susan (Tr. 1742). Frank Eaton left for work at 7:35 (Tr. 848), and Susan left for school together with Eddie and David at 8:20 (Tr. 1741).

Mrs. Eaton apparently started waxing, using a liquid which she applied with a hand applicator. (Tr. 919.) At 10:00 no one at the Eaton home answered the knock of Mrs. Seidel, a commercial census compiler who knew Mrs. Eaton from earlier acquaintance. (Tr. 774). Mrs. Eaton was home, however, when Mrs. Seidel returned later in the morning; she spoke to Mrs. Seidel for a few moments, and showed her out between 11:00 and 11:30. (Tr. 775) She was the last person known to have seen Mrs. Eaton alive, except for her killer.

Frank Eaton discovered his wife's body at 6:45 p.m. (Tr. 1752), next to the bed in Eddie's room (Tr. 858), two hours after he had returned hom from work (Tr. 850). Susan and David Mann had returned an hour earlier, at 3:40 p.m. (Tr. 1742), and remained about the house without discovering Mrs. Eaton's body. The coroner who performed an autopsy the next morning, (Tr. 1631), Dr. Ridge, placed the time of death as "within four hours, probably somewhat less, from the time that [some (Tr. 1663)] orange . . . pulp was ingested." (Tr. 1664.) Mrs. Eaton probably ate her orange, not at breakfast (Tr. 1812), but with a snack later on, according to her custom (Tr. 895). Thus, the time of death might have been anywhere from 11:00 or 11:30 a.m., when Mrs. Seiden departed, to 3:40 p.m., when Susan and David Mann returned.

The intruder apparently did not forcibly break into Mrs. Eaton's home, nor were there signs of a struggle apart from an overturned vacuum cleaner. (Tr. 1746.) Sometime after the intruder's entrance, he either had Mrs. Eaton collect her

purses or tell him where they were; or he found them himself, since two empty purses were discovered near her body in Eddie's room. (Tr. 863.) Frank Eaton guessed that two $5 bills had been in Mrs. Eaton's wallet in her purse, and that about $7 was missing from the grocery purse in the kitchen. (Tr. 852, 857.)

Mrs. Eaton was taken to or attacked in Eddie's bedroom, where her hands were bound behind her with two belts (Tr. 904, 1359), and a terry cloth robe at some point was placed over her head (Tr. 1358), with the belt possibly gagging or choking her (Tr. 903). She was probably raped by the intruder on Eddie's bed, since two sperm and some seminal fluid were later identified on a vaginal smear. (Tr. 1890.) Although such a number of sperm does not ordinarily indicate recent sexual activity, (Tr. 1891), there was evidence that veneral disease can decrease the number of sperm which a man will emit (Tr. 1917), and that petitioner tested positively for gonorrhea on April 13, 1965 (Tr. 1941). Mrs. Eaton had last had sexual relations with her husband seven days earlier (Tr. 867), and he was probably physiologically incapable of producing sperm (Tr. 1596).

Mrs. Eaton was then viciously and fatally attacked with her bread knife (Tr. 1839), which the intruder had taken from the kitchen drawer (Tr. 1807). She was struck on the front right side of her neck, or perhaps choked, possibly rendering her unconscious (Tr. 1653, 1659), and was stabbed several times. One knife wound, and the major cause of death due to massive hemorrhage and shock, was a large, incised wound of the left and front surface of the neck extending to the front lateral right side, which completely severed the left jugular vein and the trachea and reached the spine. (Tr. 1633.) This wound indicated that there may have been two applications of force following the first incision. (Tr. 1641.) Mrs. Eaton also suffered a multiple superficial incision in the back of the neck (Tr. 1635), and a deep incised oval wound of the left chest in the front which penetrated the ribs, the left lung, the pericardial sac, and the heart, making five entries into the heart. (Tr. 1637). Before leaving, the

attacker apparently partially covered Mrs. Eaton's body with the bedding where it lay next to the bed (Tr. 861), washed the knife, and replaced it in the kitchen drawer (Tr. 1287).

The principal evidence identifying petitioner as Mrs. Eaton's killer was that he gave Mrs. Eaton's two rings to girlfriends in Pasadena on the evening of the murder. (Tr. 994, 1026, 1086, 1103.) Mrs. Eaton was wearing her rings the day before. (Tr. 845.) One of the rings was found, upon examination, to have on it a quantity of blood too small to type, and also some particles of wax that might have been the sort which Mrs. Eaton was using, or any other commercial floor wax. (Tr. 1847-1848, 1896-1906, 2407-2412.)

Petitioner's whereabouts during the morning and early afternoon of the murder were determined by fitting together the recollections of persons in the neighborhood from whom he was seeking employment. His time until 11:30, between 12:00 and 12:30, and after 1:00 was adequately accounted for, but the intervals from about 11:30 to 12:00 and from 12:30 to 1:00 were subject to doubt, and might have provided opportunities for commission of the murder. Petitioner lived not far from Mrs. Eaton's house. A loan company employee testified that she talked to him by phone at home at 10:10. (Tr. 659.) A neighbor of the Eatons testified that petitioner came to his house at 10:30 and asked to see his tenants (whose windows overlooked the rear of the Eaton house (Tr. 739-740, 752-753)). The tenants were out; petitioner was not admitted; and he next went to inquire about buying a car. (Tr. 722-723.) He was reported seen looking at cars on a commercial street at 10:30 (Tr. 757); seeking employment before 11:00 Don's Drive-in (Tr. 2377), "between 10 and 12 . . . around 11" at Scritchfield Motors (Tr. 2396-2397), and "at 11:30 . . . somewhere in that vicinity" at Poinsettia Bowling (Tr. 2382). The witness at Poinsettia suggested that petitioner should go to seek work at Scritchfield. It was two long blocks, five or ten minutes' walk, from Poinsettia or Scritchfield to Mrs. Eaton's house. (Tr. 3112.)

Petitioner was next seen at just about 12:00 noon by Mr. and Mrs. Shinavar, who lived across the street from the Eatons and a few feet to the north. (Tr. 788, 802.) Petitioner asked for work and Mr. Shinavar offered him a dollar if he could catch a gopher under his lawn. After talking for a while, petitioner said that he needed a job and needed money; and he left, walking north and across the street toward the home of Mrs. Lopez, two houses north of the Eaton house. (Tr. 804-805.) Mrs. Lopez recalled that petitioner knocked on her door at about 12:25 and asked for work. She told him she had none and he left, walking south toward Ocean Avenue. She remembered immediately telephoning at 12:27 to find out the time so she could catch a bus. (Tr. 650-652, 654.)

Mr. Shinavar saw petitioner again some time before 1:00 p.m., when petitioner returned with a cultivator and a piece of wire to use in poking for the gopher, and poked around for awhile. (Tr. 806-808.) Petitioner then walked the long block to his home on Ocean Avenue where his parole officer, Mr. Ansell, said he met petitioner at "no more than 10 minutes after 1:00." (Tr. 1372.) The time at which Mr. Shinavar saw petitioner return with the paraphernalia was fixed from several reference points. He testified that petitioner left "just before 1:00" after being at his house "somewhere around 20, 25 minutes," poking at the gopher hole, attempting to flush out the gopher, and talking to Mr. Shinavar. (Tr. 817.) He also stated that petitioner was gone "roughly 35, 40 minutes" between the first and second times that Mr. Shinavar saw him (Tr. 806), and that petitioner had left the first time at about 12:05 (Tr. 816). Mr. Shinavar testified that petitioner had told him that he had "scrounged" the wire and the cultivator "on the corner"–the Eatons' house–and that no one was home. (Tr. 808.) The cultivator had indeed been previously lying around the rear of the Eaton premises, broken and apparently scrapped (Tr. 865-866, 885-886, 906-907), and petitioner had been in and around the Eaton house on several occasions, as an acquaintance of Eddie Eaton (Tr. 886-887, 1803-1806).

Other circumstantial evidence connects petitioner to the crime. On the afternoon and evening of the murder and the next day petitioner was seen spending about $20, including three $5 bills. (Tr. 931-940.) Petitioner apparently had no money on the morning of the murder. (Tr. 1405.) On a black shirt which petitioner might have been wearing at the time the murder was committed (Tr. 747, 798, 882), the examining criminalist found two red wool fibers, one-sixteenth of an inch long (Tr. 1840), the same color as a blanket on the bed where Mrs. Eaton was killed (Tr. 1913). Although too small to identify with certainty, the fibers could have come from that blanket or from any similarly colored wool source. (Tr. 1914.) Finally, as noted above, petitioner was acquainted with the Eatons and their children, and thus might have been admitted to the house.

Neither footprints nor fingerprints of unidentified people were found about the house. (Tr. 1980.) Vacuuming of the entire house produced hair samples matching each of the persons and animals living in the house, and sixteen distinguishable unidentified samples, none however corresponding with petitioner's hair. (Tr. 1841.) Although the vaginal smear was tested for the presence of sperm, it was not subjected to an agglutination or absorption test (which is designed to type seminal fluid as blood is typed).[2b]

Fellow inmates and police authorities reported a number of statements by petitioner which appeared to constitute admissions or to indicate his consciousness of guilt:

In early May, David Luker, a trustee inmate in the county jail, said he asked petitioner "if he killed the woman and he said yes. He killed her but he didn't rape her." (Tr. 1698.)

[2b] See 12 AM JUR. PROOF OF FACTS (1962), §§ 13-20. Such tests have been held admissible for the purpose of excluding a possible suspect in a rape case. *People v. Kemp*, 55 Cal. 2d 458, 465, 359 P.2d 913, 916, 11 Cal. Rptr. 361, 364 (1961).

Bobby Williamson, a cell-mate, said that petitioner told him, on August 19, 1965, that "if they didn't get him out of that county jail he was going to kill someone else." (Tr. 1133.) Petitioner also told Williamson "that he knew who done it, but he didn't do it." (Tr. 1128-A.)

In October, petitioner told Police Lieutenant Urias, "Well, look, I'm a marked man. And now a story about some rings. I'm doomed." (Tr. 1721.)

The afternoon of the murder, driving home in the car of his parole officer, Mr. Ansell, petitioner said, "It seems like every time things start to go well for me something happens to mess it up." (Tr. 1383.) Ansell testified that the statement "at the time didn't seem odd" (Tr. 1383), and it may have had a general reference in the context of petitioner's first meeting with a new parole officer (Tr. 1371).

The evening following the murder, as petitioner was driving back to Ventura from Pasadena at 11:30 p.m., he said to an acquaintance: "When I gets back to Ventura the police will probably be waiting for me.... They will probably be sittin' on my doorsteps...." (Tr. 947.) Petitioner's reference, however, might have been to violation of his 10:00 p.m. parole curfew, since his mother had previously called police when he stayed out very late (Tr. 2103, 2185-2186).

On April 29, three days after the murder, petitioner told Inspector King during interrogation, "it was between eleven and twelve o'clock when she was dead. I know goddamn well I was at home then." (Tr. 1438). The prosecutor argued that no evidence in the case showed that petitioner had then been told that Mrs. Eaton had died at that time. (Tr. 2755.) The context of the interrogation indicates that a newspaper story was being discussed, however, and Inspector King's immediately preceding statement was: "I don't care what the paper said. That paper don't know everything that I know." (Tr. 1438.)

During the same interrogation, when Inspector King informed petitioner that Mrs. Eaton's rings had been found,

petitioner said, "Oh, man, I've been had. Them damn rings." (Tr. 1431.) Petitioner told a great many conflicting stories about where he had obtained the rings. He said that he had them "for so goddamn long it's been pitiful" (Tr. 1431), that he "bought them from some cat . . . down on the corner, yesterday" (Tr. 1436), and that when he "scrounged" the cultivator at the Eaton house he saw them "laying on the ground and I picked them up" (Tr. 1444). Petitioner told fellow inmate Bobby Williamson that "he went up to her house to borrow some tools . . . and knocked on the door and that the door was open, and he saw a ring laying inside the door . . . and then he saw another one . . . and picked that up." (Tr. 1129.)

On November 8, Deputy Sheriff Markley was asked by petitioner when he would get his shoes back and he told petitioner that they were being held as evidence. He testified that petitioner said, "'Those weren't even the shoes I were wearing when I–' And then he stopped himself–His face went blank." (Tr. 1823.)

B. The Dodd Killing

Three years before the Eaton murder, in April 1962, Mrs. Kathleen Nell Dodd lived with her husband, Robert, and her two small children (Tr. 57-58, 61) at the foot of South Hurst Street, a north-south street, where it dead-ends into the tracks of the Southern Pacific railroad to the south. (Tr. 145.) Like the Eaton house, the Dodd house was not far from petitioner's home on Ocean Avenue, but in the opposite direction–west along Ocean, then south along Hurst. (Tr. 151-152.) The Dodd neighborhood was apparently not a good one: Mrs. Dodd had expressed apprehension about her safety since transients frequented the area near the tracks, and the dead end of Hurst was something of a lovers' lane. (Tr. 2001-2006, 2032.)

Robert Dodd left his wife at home at 6:30 p.m. on the evening of April 3, 1962, and went to his usual evening college classes (Tr. 62), and then to Oxnard on business and to

a bar (Tr. 63). He frequently stayed out late studying at the sheriff's office where he worked as a deputy, or at the library. (Tr. 104, 105.) Mrs. Dodd made it a practice of locking her doors and not opening them before peeping out to ascertain the identity of visitors, even in the instance of friends who lived nearby and had called a few minutes earlier to say that they were coming over. (Tr. 2000.)

At some point during the evening, after her children were put to bed, Mrs. Dodd was watching television (Tr. 67) and drinking tea when someone came to the house and entered without forcing a lock, either upon admission by Mrs. Dodd, or because, on this occasion, a door had been left unfastened. (Tr. 111-112.) She spilled her tea (Tr. 68, 70), possibly because she was surprised by an intruder or in an attempt to escape from the house. She had once told a neighbor that if she were attacked in the house she would run outside to protect her children by leading the attacker away. (Tr. 2001.) The intruder probably took $60 from a drawer where Mr. Dodd testified he put rent money that he had collected (Tr. 80, 122, 2015); and he took a butcher knife from the kitchen rack (Tr. 83).

Mrs. Dodd, who was five months pregnant (Tr. 127), either went or was taken out through the front door to a spot on the railroad enbankment several hundred yards west of her house. (Tr. 153.) There was no struggle in the house (Tr. 67-68), and police later found no signs that Mrs. Dodd had been dragged to the embankment (Tr. 139-155, 180-227). At the railroad embankment she was raped (see Tr. 677), at a spot where impressions of a body and her panties and glasses were later found (Tr. 145-146).

At some time thereafter, Mrs. Dodd was able to put on her capri pants (Tr. 29, 669), and to go east down the tracks to the south side in the direction of some houses. One resident, Claire McWilliams, was awakened by a scream at about midnight, and ran outside with her dog to see Mrs. Dodd staggering up a neighbor's driveway, where she immediately collapsed and died. Mrs. McWilliams noticed

er dog barking while facing east, and then she heard wigs crackling in a northerly direction. (Tr . 26-33.) The olice later found signs of flattened grass, as though someone ad lain or crawled over it, in the area toward which the og was pointing. (Tr. 155.)

Mrs. Dodd died from several severe wounds suffered in a vage knife attack. The principal wounds were in her neck, e severing the artery that carries blood from the heart to e brain. (Tr. 180-181.) In addition to three more major ck wounds (Tr. 183-187), she was stabbed through the ck of the right arm and right chest wall into the lung r. 193-197), through the upper right abdomen into the er (Tr. 198), and deeply in the left shoulder (Tr. 201-202); e was cut several times on the left hand; (Tr. 203-205); d she had a number of abrasions and bruises (Tr. 189-191, 0-213).

Mr. Dodd returned home at 1:30 a.m. (Tr. 62), to find the ildren still asleep, the television set on, (Tr. 67-68), and e back door unlocked (Tr. 64-66). No one had witnessed s. Dodd's murder; and so again, the evidence connecting itioner to the crime was circumstantial.

The knife taken from the Dodd kitchen, marked with s. Dodd's blood, was found in some weeds between the ses at the western end of Ocean Avenue and the railroad cks, at a point on a line between the murder scene south the tracks and petitioner's home. (Tr. 144-145, 153.)

During the week before the murder, a brown car had been n parked at the dead-end of Hurst, near the Dodd resi- ce, from midnight until 5:00 a.m. (Tr. 2021). Petitioner bought a brown and tan Chevrolet the week before (Tr. 2-2435, 2479-2481); but the neighbor who described the icious vehicle said that it was a solid color (Tr. 2031).

green corduroy coat which petitioner was seen wearing he evening of April 3 was never seen thereafter by his ds. (Tr. 265, 573-574, 2190). On April 4 petitioner a scratch on his face which had not been seen the day re. (Tr. 238-340, 505.)

A crushed pack of Salem cigarettes and matches were found at the murder scene. (Tr. 140.) Petitioner sometimes smoked Salems, although he smoked a number of other brands as well, and Mrs. Dodd usually smoked Salems. (Tr. 92, 761, 1322, 1491, 2673-2676.)

Three or four days after the murder, petitioner was seen with money at a crap game. One witness said that petitioner lost $78 or $80. (Tr. 334-335.) Another said he saw petitioner with $250 toward the end of the game. (Tr. 576.)

These two witnesses were also with petitioner on the evening of the murder. They testified that they dropped him off at home at 11:00 p.m. (Tr. 237), after he said at 10:45 that he had a date that night with a white woman (Tr. 499). A number of petitioner's friends testified that petitioner had made various remarks concerning his interest in sexual relations with white women. (Tr. 238, 349.)

One of petitioner's two companions saw him the day after the murder at police headquarters, where petitioner told him that he was under suspicion of killing Mrs. Dodd. (Tr. 503.) The next day, according to the witness, petitioner said, "'I did it,' and I said, 'Well, what did you do?' . . . he said, "I killed that woman.' I said, 'What woman?' And he said, 'I killed the Dodd woman.' . . . he said, 'She was going to cut me loose.'" (Tr. 505.)

Petitioner explained the scratch on his face to the same witness by saying: "Nothin' but that good lovin'." (Tr. 506.) However, petitioner's other companion heard petitioner say that he got the scratch when Policewoman Ida Spellman slapped him,[3b] and then two or three days later that he had scratched his face in the garage on a nail (Tr. 241). When he confronted petitioner with this discrepancy, petitioner said, "he didn't want to talk about it." (Tr. 242.) Two or three days after the murder, when it was being discussed, petitioner said, "He didn't want to hear it." (Tr. 242.)

[3b]She testified that she had never slapped petitioner. (Tr. 607-608.)

While in jails, reform schools, and correctional institutions for much of the time between 1962 and 1965, petitioner made a number of incriminating statements to fellow inmates:

Gene Noreen was in Preston reform school with petitioner. While he was reading a comic book, petitioner came over and told him that petitioner had raped and killed a sheriff's wife. (Tr. 427-428, 440.) Petitioner "came over and . . . was just bragging about killing and [sic] old gal and raping her." (Tr. 428.) "[H]e just said he cut her up and raped her, . . . he said he come up to the door, knocked, and she come to the door, she opened it a crack, and he pushed his way in, and he was fighting with her, running around with her, and she scratched him, and it made him mad, and he tore some of her clothes off and chased her, and finally she tripped or fell or something, and it made him mad, and he cut her up." (Tr. 432.)

Barney White was with petitioner in Juvenile Hall in July, 1962. He testified that petitioner "was talking about burglaries and different things, and he said he was burglarizing the house over in Ventura, and he went into this one house, through the back door there by the kitchen, and this lady, Mrs. Dodd, came into the kitchen and told him to get out or—she asked him what he was doing . . . and he picked up a knife there and . . . chased her outside and around the house, through a field over by the railroad tracks and stabbed and killed her and raped her." (Tr. 456.)

Bennie Rochester, who was in jail with petitioner at the same time, said that after they saw Deputy Dodd at the jail, petitioner told Rochester that he had killed Dodd's wife. (Tr. 469.) Petitioner later told Rochester that this story was untrue; that he was just kidding. (Tr. 470-471.)

Richard Carreiro was at Preston with petitioner in 1962 and at another reform school with him in 1963. He said that petitioner told him "just that he got into an argument with her and he had killed a white girl . . . he was in the house . . . and slapped her around . . . she started running. He was

chasing her through back ways, caught her in the yard and stabbed her." (Tr. 475-476.)

On the first day of the trial, petitioner also made the following three remarks to the deputy who was guarding him: When Mrs. McWilliams was testifying concerning her discovery of Mrs. Dodd's body, petitioner said, "She is saying things that only I know." (Tr. 1826). When Mr. Dodd was testifying to the amount of money that was in the drawer at his home, petitioner told him, "He wouldn't know that unless someone told him." (Tr. 1827). Finally, when Mrs. McWilliams was testifying that her son followed her out of the house with a gun, petitioner said, "They were out there to kill me." (Tr. 1827.)

APPENDIX C

PUNISHMENTS AUTHORIZED BY LAW AND USAGE, 1786–1800

This appendix sets out some of the punishments authorized by law and commonly used in America at the time of drafting and adoption of the Eighth Amendment. Part A lists provisions of colonial, state and federal law authorizing corporal punishments other than death for freemen. Part B lists the same provisions for slaves. Part C describes the customs of infliction of the punishments. Part D deals with the penalty of banishment.

A. Penal Laws Applicable to Freemen

UNITED STATES

CRIME	PUNISHMENT	SOURCE
Theft	Whipping, no more than thirty-nine stripes	1 Stat. 112, 116 (Act of April 30, 1790, ch. 9, § 16)
Receiving stolen goods	Whipping, no more than thirty-nine stripes	1 Stat. 112, 116 (Act of April 30, 1790, ch. 9, § 17)
Perjury	The pillory, one hour	1 Stat. 112, 116 (Act of April 30, 1790, ch. 9, § 18)

CONNECTICUT

Acts and Laws of the State of Connecticut in America, Printed by Elisha Babcock (Hartford, 1786) (1 vol.)

CRIME	PUNISHMENT	SOURCE
Adultery	Whipping on bare body; burning of letter "A" in forehead; wearing of metal halter around the neck for rest of life	p. 8 (date of original enactment is not given for any of these laws in force in 1786)

Burglary (not aggravated)	Whipping, no more than forty stripes	p. 18
Counterfeiting (1st offense)	Whipping, no more than twenty stripes	p. 24
Counterfeiting (2nd offense)	Whipping, no more than thirty stripes (also imprisonment for life)	p. 24
Defamation of any Court	Banishment	p. 38
Drunkenness	The stocks, one hour (if unable to pay eight shilling fine)	p. 43
Fornication	Whipping, no more than ten stripes (if unable to pay thirty-three shilling fine)	p. 87
Incest	Whipping, no more than forty stripes; wearing of a capital "I" on clothing forever	p. 136
Mansalughter	Whipping; burning in hand of letter "M"	p. 135
Perjury	The pillory, one hour; nailing of both ears (if unable to pay twenty-pound fine)	p. 191
Rioting	Whipping, no more than forty stripes	p. 205
Theft	Whipping, no more than ten stripes	p. 245

DELAWARE

Laws of the State of Delaware, published by Authority, printed by Samuel and John Adams (Newcastle, 1797) (2 vols.)

CRIME	PUNISHMENT	SOURCE
Murders and felons	Buring in hand of letter "M" or "T"	vol. 1, p. 72 (enacted 1719, ch. 22a, § 27)
Adultory or fornication	Whipping, twenty-one lashes	vol. 1, p. 105 (ch. 44, § 1) (date of original enactment of these laws in force in 1797)
Whitewomen bearing mulatto child	The pillory, two hours; whipping, thirty-nine stripes	vol. 1, p. 108 (ch. 44, § 9)
Whiteman fornicating with Negro	Whipping, twenty-one lashes	vol. 1, p. 109 (ch. 44, § 10)
Blasphemy	The pillory, two hours; branding in forehead of letter "B"; whipping, thirty-nine lashes	vol. 1, p. 174 (ch. 67a, § 5)
Drunkeness or swearing	The stocks, no more than three hours	vol. 1, p. 174 (ch. 67a, §§ 2 & 4)
Free Negro dealing with slave	Whipping, no more than twenty-one lashes	vol. 1, p. 215 (ch. 77a, § 12)
Receiving stolen goods	Whipping, twenty-one lashes; branding in forehead of letter "R"	Vol. 1, p. 238 (ch. 90 § 9)
Larcency (1st offense)	Whipping, no more than twenty-one lashes; wearing of "T" on clothing for six months	vol. 1, p. 296 (ch. 120a, § 1)
Larceny (2nd offense)	Whipping, no more than thirty-one lashes; the pillory, two hours	vol. 1, p. 297 (ch. 120, § 2)

Horse or slave stealing	The pillory, one hour; whipping, thirty-nine stripes; severing the soft part of one ear.	vol. 2, p. 668 (enacted 1779, ch. 45, § 1)
Counterfeiting or embezzling	The pillory, one hour; whipping, thirty-nine stripes; severing the soft part of one ear.	vol. 2, p. 773 (enacted Feb. 8, 1783, ch. 96)

GEORGIA

A Digest of the Laws of the State of Georgia, by Robert and George Watkins, printed by R. Aitken (Philadelphia, 1800) (1 vol.)

CRIME	PUNISHMENT	SOURCE
Selling goods on Sunday	The stocks, two hours (if unable to pay ten shilling fine)	p. 81 (enacted March 4, 1762, Act. no. 88)
Winning money by fraud or deceit	Corporal punishment	p. 95 (enacted Feb. 29, 1764, Act no. 111)
Counterfeiting	Three public whippings	p. 181 (enacted Sept. 29, 1773, Act no. 213)
Horse stealing	The pillory, two hours to four hours; three public whippings of thirty-nine lashes each; branding in shoulder of letter "R"	p. 184 (enacted Sept. 29, 1773, Act no. 220)
Maiming	The pillory; whipping. no more than one hundred stripes (if unable to pay one hundred pound fine)	p. 357 (enacted Feb. 10, 1787, Act no. 372)
Vagabond unable to find work	Whipping, no more than thirty-nine lashes	p. 377 (enacted Feb. 1, 1788, Act no. 391)

MARYLAND

ıe Laws of Maryland, Revised and Collected, under the ıthority of the Legislature, by William Kilty, printed by ederick Green, Printer to the State (Annapolis, 1799) (2 ls.)

CRIME	PUNISHMENT	SOURCE
jury	The pillory, two hours; nailing of both ears (if unable to pay 20 shilling fine)	vol. 1, unpaginated (enacted 1692, ch. 16, § 4)
every	The pillory, whipping, no more than forty stripes	vol. 1, unpaginated (enacted June 3, 1715, ch. 26, § 2)
ng unmarked ıe	The pillory; whipping, no more than forty stripes	vol. 1, unpaginated (enacted June 3, 1715, ch. 26, § 5)
phemy offense)	Boring through the tongue	vol. 1, unpaginated (enacted Oct. 26, 1723, ch. 16 § 1)
phemy offense)	Branding in fore-head of letter "B"	vol. 1, unpaginated (enacted Oct. 26, 1723, ch. 16, § 1)
oring escaped	Whipping, no more than thirty-nine stripes (if unable to pay fine of up to 600 pounds of tobacco)	vol. 1, unpaginated (enacted May 1748, ch. 19, § 3)

MASSACHUSETTS

The Perpetual Laws of the Commonwealth of Massachusetts, compiled, arranged and printed to the wishes of many respectable law characters, and the approbation of the Honorable Judges of the Supreme Judicial Court, printed by Isaiah Thomas (Worcester, 1788) (1 vol.)

CRIME	PUNISHMENT	SOURCE
Conveying any tool or instrument into a prison (if it aids an escape)	Whipping, no more than forty stripes; the pillory	p. 41 (enacted Feb. 21, 1785)
Frauds on the Massachusetts Bank	The pillory, two hours	p. 189 (enacted March 16, 1784)
Trespass or vandalism at night	Whipping, no more than twenty stripes	p. 216 (enacted Nov. 23, 1785)
Selling unwholesome provisions	The pillory	p. 221 (enacted March 8, 1785)
Counterfeiting	The pillory, one hour; severing of ear; whipping, no more than forty stripes	p. 224 (enacted July 4, 1786)
Forgery	The pillory; cropping of one ear	p. 226 (enacted March 16, 1785)
Violation of National Bank Act	The pillory, up to three times; severing of one ear; whipping no more than four times, thirty nine stripes each; branding in forehead of letter "F"	p. 228 (enacted Nov. 1, 1785)
Theft (1st offense)	Whipping, no more than thirty nine stripes	p. 228 (enacted March 15, 1785)
Theft (2nd offense)	Whipping, branding in right cheek of letter "T"	pp. 229-230 (enacted March 18, 1785)

Breaking and entering (2nd offense)	Whipping; branding in both cheeks of letter "B"	p. 230 (enacted March 15, 1785)
Perjury	The pillory, two hours; whipping, no more than thirty-nine stripes	p. 234 (enacted March 9, 1785)
Blasphemy	The pillory; whipping	p. 235 (enacted July 3, 1782)
Failure to disperse	Whipping, thirty-nine stripes	p. 244 (enacted Oct. 28, 1786)
Adultery	Whipping, no more than thirty-nine stripes	p. 244 (enacted Feb. 17, 1785)
Polygamy	Whipping, no more than thirty-nine stripes	p. 245 (enacted Feb. 17, 1785)
Fornication	Whipping, no more than ten stripes (if unable to pay thirty shilling to five pound fine)	p. 246 (enacted March 15, 1786
Dueling	Whipping, no more than thirty-nine stripes	p. 248 (enacted June 30, 1784
Manslaughter	Branding in forehead of letter "M"	p. 249 (enacted Feb. 28, 1785)
Daylight arson	The pillory, three times; whipping, four times	p. 249 (enacted March 11, 1785
Assault with felonious intent	The pillory; whipping	p. 250 (enacted March 9, 1785)
Harboring felons	The pillory	p. 252 (enacted March 15, 1785)
Felonious Assault	The pillory, three times; whipping, no more than thirty-nine stripes	p. 252-253 (enacted March 15, 1785)

Negro remaining in Massachusetts after being ordered to leave	Whipping, no more than ten stripes	p. 349 (enacted March 26, 1788)

NEW HAMPSHIRE

Laws of New Hampshire, edited by Albert Stillman Batchellor, published by the John B. Clarke Company (Manchester, 1904) (10 vols.)

CRIME	PUNISHMENT	SOURCE
Adultery	Whipping, no more than forty stripes; wearing of two-inch letter "A" on clothing forever	vol. 1, p. 676 (enacted June 14, 1701, ch. 6)
Swearing	The stocks, two hours (if unable to pay one shilling fine)	vol. 1, p. 677 (enacted June 14, 1701, ch. 7)
Drunkenness	The stocks, two hours (if unable to pay one shilling fine)	vol. 1, p. 678 (enacted June 14, 1701, ch. 7)
Stealing	Whipping, twenty stripes	vol. 1, p. 678 (enacted June 14, 1701, ch. 7)
Fornication	Whipping, ten stripes	vol. 1, p. 678 (enacted June 14, 1701, ch. 7)
Incest	Whipping, no more than forty stripes; wearing of two-inch capital "I" on clothing forever	vol. 2, p. 125 (enacted May 15, 1714, ch. 5)
Receiving stolen goods	Whipping, no more than twenty stripes (if unable to make restitution)	vol. 2, p. 129 (enacted May 15, 1714, ch. 9)
Disorderly persons not working	Whipping, the stocks	vol. 2, p. 269 (enacted May 14, 1718, ch. 15)
Assault on a woman	Whipping, no more than ten stripes	vol. 2, p. 281 (enacted May 14, 1718, ch. 19)

Blasphemy	The pillory; whipping; boring through the tongue with a red-hot iron (no more than two of these to be inflicted for one act)	vol. 2, p. 314 (enacted May 14, 1718, ch. 38)
Swearing by common sailor	The stocks, two hours; whipping, ten to twenty stripes (if unable to pay four to eight shilling fine)	vol. 3, p. 30 (enacted June 18, 1747, ch. 4)
Breaking street lamp by Indian	Whipping, no more than ten stripes (if unable to pay ten pound fine)	vol. 3, p. 73 (enacted March 2, 1754, ch. 6)
Rioting	Whipping, thirty stripes	vol. 3, p. 78 (enacted April 22, 1754, ch. 10)
Counterfeiting	The pillory, one hour; cropping of one ear; whipping, no more than twenty stripes	vol. 3, p. 613 (enacted Jan. 28, 1774, ch. 7)

NEW YORK

Laws of the State of New York, Comprising the Constitution and the Acts of the Legislature, printed by Thomas Greenleaf (New York, 1792) (2 vols.)

CRIME	PUNISHMENT	SOURCE
Petty larceny	Corporal punishment, including whipping, no more than thirty-nine lashes	vol. 1, p. 422, (enacted March 24, 1787, Tenth sess., ch. 65, § 1)
Perjury or subornation of perjury	The pillory, one hour (if unable to pay one hundred pound fine)	vol. 2, p. 36 (enacted Feb. 7, 1788, Eleventh sess., ch. 17, §§ 1-2)
Disorderly persons	Correction by whipping	vol. 2, p. 53 (enacted Feb. 9, 1788, Eleventh session, ch. 31, § 3)

Deceitful gaming	Corporal punishment	vol. 2, p. 62 (enacted Feb. 20, 1788, Eleventh sess., ch. 35, § 5)
Swearing	The stocks, two hours (if unable to pay three shilling fine)	vol. 2, p. 91 (enacted Feb. 23, 1788, Eleventh sess., ch. 42, § 6)
Grave robbing	The pillory; corporal punishment	vol. 2, p. 219 (enacted Jan. 6, 1789, Twelfth sess., ch. 3, § 1)

NORTH CAROLINA

Laws of the State of North Carolina, published according to an Act of Assembly, by James Iredell, now one of the Associate Justices of the Supreme Court of the United States, printed by Hodge & Wills, Printers to the State of North Carolina (Edenton, 1791) (1 vol.)

CRIME	PUNISHMENT	SOURCE
Stealing cattle or hogs (1st offense)	Whipping, forty lashes	p. 73 (enacted 1741, ch. 8, § 2)
Stealing cattle or hogs (2nd offense)	Whipping, forty lashes; the pillory, two hours; branding in left hand of letter "T"	p. 73 (enacted 1741, ch. 8, § 2)
Free Negro, mullato or Indian giving false testimony	Nailing of one ear; the pillory, one hour; severing of ear; repeated with other ear; whipping thirty-nine lashes	p. 94 (enacted 1741, ch. 24, § 50)
Subor ning perjury	The pillory, one hour; nailing of one ear	p. 287 (enacted 1777, ch. 5, § 1)
Perjury	The pillory, one hour; nailing of both ears; severing of both ears	p. 288 (enacted 1777, ch. 5, § 11)

Counterfeiting	The pillory, three hours; nailing of right ear; severing of right ear; whipping, thirty-nine lashes; branding in right cheek of letter "C" (brand to be at least 1" x ¾")	p. 389 (enacted 1779, ch. 8, § 2)
?ssing counterfeit ertificates	The pillory, one hour; severing of one ear; whipping, thirty-nine lashes	p. 390 (enacted 1779, ch. 8, § 3)
lunting in woods y fire light	Whipping, thirty-nine lashes	p. 507 (enacted 1784, ch. 33, § 1)
'agrancy (repeat ffender)	Whipping, thirty-nine lashes	p. 508 (enacted 1784 ch. 34, § 2)
orse stealing	The pillory, one hour; nailing of both ears; severing of both ears; branding in right cheek of letter "H"; branding in left cheek of letter "T"	p. 580 (enacted 1786, ch. 7, § 1)

PENNSYLVANIA

ws of the Commonwealth of Pennsylvania, published der the Authority of the Legislature by Alexander James illas, Printed by Hall and Sellers (Philadelphia, 1797) vols.)

CRIME	PUNISHMENT	SOURCE
gery	The pillory	vol. 1, p. 5 (enacted 1700, ch. 16)
ultery d offense)	Whipping, twenty-one lashes; branding in forehead of letter "A"	vol. 1, p. 47 (enacted 1705, ch. 122, § 1)
my	Whipping, thirty-nine lashes	vol. 1, p. 49 (enacted 1705, ch. 123)

Woman convicted of felony	Burning in hand with letter "T"	vol. 1, p. 141 (enacted 1718, ch. 247, § 21)
Larceny (1st offense)	Whipping, twenty-one stripes	vol. 1, p. 144 (enacted 1718, ch. 247, § 29)
Larceny (2nd offense)	Whipping, twenty-one to forty stripes	vol. 1, p. 144 (enacted 1718, ch. 247, § 29)
Larceny (3rd offense)	Whipping, thirty-nine to fifty stripes	vol. 1, p. 144 (enacted 1718, ch. 247, § 29)
Counterfeiting	The pillory, one hour; nailing and severing of both ears; whipping, twenty-one lashes	vol. 1, p. 477 (enacted 1767, ch. 567, § 2)
Horse stealing	The pillory, one hour; whipping, thirty-nine lashes	vol. 1, p. 477 (enacted 1767, ch. 567, § 3)
Breaking into a public building at night	The pillory, one hour; nailing and severing of both ears; whipping, twenty-one lashes	vol. 1, p. 622 (enacted 1772, ch. 663, § 2)
Altering the denomination of bank notes	The pillory, one hour; nailing and severing of both ears; whipping, twenty-one lashes	vol. 2, p. 104 (enacted 1783, ch. 66, § 15

RHODE ISLAND

The Public Laws of the State of Rhode Island and Providence Plantations, published by Authority, printed by Carter and Wilkinson (Providence, 1798) (1 vol.)

CRIME	PUNISHMENT	SOURCE
Counterfeiting	The pillory; cropping of both ears; branding with letter "C"	p. 586 (§ 9) (date of original enactment is not given for any of these laws in force in 1798)
Falsification of Court Records	The pillory; cropping of both ears; branding	p. 588 (§ 10)

Perjury	The pillory; cropping of both ears; branding	p. 588 (§ 11)
Horsestealing	Whipping, no more than ten stripes	p. 590 (§ 18)
Theft	Whipping, no more than twenty stripes (if unable to pay twenty dollar fine)	p. 593 (§ 25)

SOUTH CAROLINA

The Public Laws of the State of South Carolina, by the Honorable John Faucheraud Grimké, Esq., printed by R. Aitken & Son (Philadelphia, 1970) (1 vol.)

CRIME	PUNISHMENT	SOURCE
Bastardy (1st offense)	Whipping, no more than thirty-one stripes (if unable to pay five to ten shilling fine)	p. 5 (enacted Sept. 17, 1703, Act no. 213)
Bastardy (2nd offense)	Whppings, no more than thirty-nine stripes (if unable to pay five to ten shilling fine)	p. 5 (enacted Sept. 17, 1703, Act no. 213)
Bastardy (3rd offense)	Tying to tail of cart and whipping through streets	p. 5 (enacted Sept. 17, 1703, Act no. 213)
Receiving stolen goods	The pillory; whipping	p. 274 (enacted Aug. 23, 1769, Act no. 1096)
Defacing of coins	The pillory, two days, one hour each day	p. 398 (enacted Oct. 12, 1785, Act no. 1408)
Stealing livestock (1st offense)	Whipping, no more than thirty-nine lashes	p. 486 (enacted March 13, 1789, Act no. 1577)
Stealing livestock (2nd offense)	Whipping, no more than fifty lashes	p. 486 (enacted March 13, 1789, Act no. 1577)

VERMONT

Statutes of the State of Vermont, Revised and established by Authority, in the year 1787, including those passed since that period until . . . January 1791, printed by Anthony Haswell (Bennington, 1791) (1 vol.)

CRIME	PUNISHMENT	SOURCE
Adultery	Whipping, no more than thirty-nine stripes; wearing of a two-inch capital "A" on clothing forever	p. 17 (enacted March 8, 1787)
Failure to wear letter "A"	Whipping, no more than ten stripes	p. 17 (enacted March 8, 1787)
Counterfeiting	Severing of right ear; branding of capital "C" with hot iron	p. 37 (enacted March 8, 1787)
Defamation	Banishment	p. 48 (enacted March 9, 1787)
Swearing, cursing or drunkenness	The stocks, one to three hours (if unable to pay six shilling fine)	pp. 50-51 (enacted Feb. 28, 1787)
Blasphemy	Whipping, no more than forty stripes; the pillory, one hour	p. 75 (enacted March 8, 1787)
Manslaughter	Whipping, no more than forty stripes; branding in hand of letter "M"	p. 75 (enacted March 8, 1787)
Theft, when not attended by force or violence	Whipping, no more than forty stripes	p. 76 (enacted March 8, 1787)
Incest	Whipping, no more than thirty-nine stripes; wearing of two inch capital letter "I" on clothing forever	p. 104 (enacted Feb. 27, 1787)

erjury	The pillory, two hours; nailing and severing of both ears (if unable to pay 30 pound fine)	p. 124 (enacted March 8, 1787)
orgery	The pillory, three days, two hours each day	p. 125 (enacted March 8, 1787)
heft	Whipping, no more more than thirty-nine lashes	p. 181 (enacted Feb. 27, 1787
orse stealing	Branding in forehead of letters "H.T."; severing of both ears	p. 282 (enacted Oct. 29, 1791)
ape	Whipping, no more than one-hundred stripes; wearing of two inch capital letter "R" on clothing forever	p. 294 (enacted Nov. 1, 1791)

VIRGINIA

Collection of All Such Acts of the General Assembly of irginia of a public and permanent nature, as are now in rce, printed by Augustine Davis, Printer for the Common-ealth (Richmond, 1794) (1 vol.)

CRIME	PUNISHMENT	SOURCE
lling unwholesome at or drink (2nd fense)	The pillory	p. 34 (enacted Nov. 27, 1786, ch. 23)
aud	The pillory	p. 50 (enacted Nov. 18, 1789, ch. 45, § 2)
g-stealing	The pillory, two hours; nailing of both ears	p. 186 (enacted Dec. 8, 1792, ch. 98, § 2)

Swearing, cursing or drunkenness	Whipping, ten lashes (if unable to pay eighty-three cent fine)	p. 286 (enacted Dec. 26, 1792, ch. 138, § 1)
Buying from or selling to slave	Whipping, thirty-nine lashes	p. 198 (enacted Dec. 17, 1792, ch. 103, §16)
Buying from or selling to white servant without leave	Whipping, thirty-nine lashes	p. 259 (enacted Dec. 26, 1792, ch. 132, § 10)

B. Penal Laws Applicable To Slaves

CONNECTICUT

Acts and Laws of the State of Connecticut in America, printed by Elisha Babcock (Hartford, 1786) (1 vol.)

CRIME	PUNISHMENT	SOURCE
Defamation	Whipping, no more than forty stripes	p. 38 (date of original enactment is not given for any of these laws in force in 1786
Breaking the peace	Whipping, no more than thirty stripes	p. 188
Stealing	Whipping, no more than thirty stripes	p. 233
Going abroad after 9 o'clock	Whipping, no more than ten stripes	p. 234

DELAWARE

Laws of the State of Delaware, published by Authority, printed by Samuel and John Adams (Newcastle, 1797) (2 vols.)

CRIME	PUNISHMENT	SOURCE
Attempted rape of white woman	The pillory, four hours; nailing and severing of both ears	vol. 1, p. 104 (ch. 43, § 5) (Date of original enactment is not given for some of these laws in force in 1797)

Negro fathering child by white woman	The pillory, two hours; nailing and severing of one ear; whipping, thirty nine lashes	vol. 1, p. 109 (ch. 44, § 9)
Killing deer out of season	Whipping, no more than twenty-one stripes	vol. 1, p. 191–192 (ch. 74, § 3)
Building fire in woods out of season	Whipping, no more thirty-one stripes	vol. 1, p. 213 (ch. 80, § 1)
Assaulting a white person	The pillory, two hours; whipping no more than thirty-nine lashes	vol. 1, p. 307 (ch. 126, § 6)
Assaulting another slave	Whipping, no more than thirty-nine lashes	vol. 1, p. 436 (enacted Oct. 31, 1767, ch. 188 § 3)

GEORGIA

A Digest of the Laws of the State of Georgia, by Robert and George Watkins, printed by R. Aitken, (Philadelphia, 1800) (1 vol.)

CRIME	PUNISHMENT	SOURCE
Wandering about without white person	Whipping, no more than twenty lashes	165 (enacted May 10, 1770, Act no. 204)
Attending illegal slave meeting	Whipping, no more than twenty-five lashes	p. 166 (enacted May 10, 1770, Act no. 204)
Administering medicine without white direction	Whipping, no more than fifty lashes	p. 169 (enacted May 10, 1770, Act no. 204)
More than seven male slaves traveling without white person	Whipping, no more than twenty lashes	p. 177 (enacted May 10, 1770, Act no. 204)

MARYLAND

The Laws of Maryland, Revised and Collected, under the Authority of the Legislature, by William Kilty, printed by Frederick Green, Printer to the State (Annapolis, 1799) (2 vols.)

CRIME	PUNISHMENT	SOURCE
Stealing	Whipping, no more than forty stripes	vol. 1, unpaginated (enacted 1717, ch. 13, § 6)
Striking of white person	Cropping of one ear	vol. 1, unpaginated (enacted 1723, ch. 15, § 4)
Unlawful assembly	Whipping, no more than thirty-nine stripes	vol. 1, unpaginated (enacted 1723, ch. 15, § 2)
Giving of false testimony	Whipping, thirty-nine stripes; cropping of one ear; the next day the other ear is cropped and thirty-nine more stripes given	vol. 1, unpaginated (enacted June 8, 1751, ch. 14, § 5)
Rambling or running away	Whipping; cropping of one ear or branding in cheek with letter "R"	vol. 1, unpaginated (enacted June 8, 1751, ch. 14, § 8)

NEW HAMPSHIRE

Laws of New Hampshire, edited by Albert Stillman Batchellor, published by The John B. Clarke Company (Manchester, 1904) (10 vols.)

CRIME	PUNISHMENT	SOURCE
Cursing or swearing	Whipping, ten to twenty stripes (if unable to pay four to eight shilling fine)	vol. 3, p. 30 (enacted June 18, 1747, ch. 4)
Breaking street lamps (1st offense)	Whipping, no more than ten stripes	vol. 3, p. 73 (enacted March 2, 1754, ch. 6)

reaking street lamps (2nd offense)	Whipping, no more than twenty stripes	vol. 3, p. 73 (enacted March 2, 1754, ch. 6)

NEW JERSEY

aws of the State of New Jersey, Revised and published nder Authority of the Legislature, by William Paterson, rinted by Mathias Day (Newark, 1800) (1 vol.)

CRIME	PUNISHMENT	SOUREC
etting deer trap	Whipping, thirty lashes (if unable to pay five pound fine)	p. 20 (enacted Dec. 21, 1771, § 8)

NEW YORK

aws of the State of New York, Comprising the Constitu- on and the Acts of the Legislature, printed by Thomas reenleaf (New York, 1792) (2 vols.)

CRIME	PUNISHMENT	SOURCE
scharge of gun or eworks to the uthward of fresh ter	Whipping, no more than thirty-nine stripes	vol. 1, p. 272 (enacted April 22, 1786, Ninth sess., ch. 43, § 2)

NORTH CAROLINA

ws of the State of North Carolina, published according an Act of Assembly, by James Iredell, now one of the sociate Justices of the Supreme Court of the United ates, printed by Hodge & Wills, Printers to the State of rth Carolina (Edenton, 1791) (1 vol.)

CRIME	PUNISHMENT	SOURCE
ling deer out season	Whipping, thirty lashes	p. 58 (enacted 1738, ch. 10, § 3)
aling cattle or gs	Severing of both ears; whipping	p. 74 (enacted 1741, ch. 8, § 10)
aling boat or oe	Whipping, no more than thirty-nine lashes	p. 77 (enacted 1741, ch. 13, § 4)

Possession of firearm	Whipping, twenty lashes	p. 93 (enacted 1741, ch. 24, § 40)
Misdemeanor	Whipping, no more than forty lashes	p. 462 (enacted 1783, ch. 14, § 2)
Hunting in woods by firelight	Whipping, thirty-nine lashes	p. 507 (enacted 1784, ch. 33, § 3)
Selling of any article without permission	Whipping, no more than thirty-nine lashes	p. 643 (enacted 1788, ch. 7, § 2)

PENNSYLVANIA

Laws of the Commonwealth of Pennsylvania, published under the Authority of the Legislature by Alexander James Dallas, printed by Hall & Sellers (Philadelphia, 1797) (4 vols.)

CRIME	PUNISHMENT	SOURCE
Killing deer out of season	Whipping, no more than thirty-one lashes (if unable to pay forty shilling fine)	vol. 1, p. 393 (enacted 1760, ch. 467, § 9)

SOUTH CAROLINA

The Public Laws of the State of South Carolina, by the Honable John Faucheraud Grimké, Esq., printed by R. Aitken & Son (Philadelphia, 1790) (1 vol.)

CRIME	PUNISHMENT	SOURCE
Night hunting of deer with fire	Whipping, no more than thirty-nine lashes	p. 497 (enacted March 13, 1789, Act no. 1586)
Stealing of boats or canoes (1st offense)	Whipping, thirty-nine lashes	p. 2 (enacted March 16, 1695-96, Act no. 126)
Away from home without ticket	Whipping, no more than twnety lashes	p. 164 (enacted May 10, 1740, Act no. 695)
Buying or selling goods	Whipping, no more than twenty lashes	p. 171 (enacted May 10, 1740, Act no. 695)
More than seven male slaves traveling	Whipping, no more than twenty lashes	p. 174 (enacted May 10, 1740, Act no. 695)

Marking or branding livestock	Whipping, no more than fifty lashes	p. 486 (enacted March 13, 1789, Act no. 1577)

VIRGINIA

A Collection of All Such Acts of the General Assembly of Virginia of a public and permanent nature, as are now in force, printed by Augustine Davis, Printer for the Commonwealth (Richmond, 1794) (1 vol.)

CRIME	PUNISHMENT	SOURCE
Hog-stealing (1st offense)	Whipping, thirty-nine lashes	p. 187 (enacted Dec. 8, 1792, ch. 98, § 4)
Hog-stealing (2nd offense)	The pillory, two hours; nailing of both ears	p. 187 (enacted Dec. 8, 1792, ch. 98, § 4)
Possession of firearms	Whipping, thirty-nine lashes	p. 196 (enacted Dec. 17, 1792, ch. 103, § 8)
Attending unlawful meeting	Whipping, twenty lashes	p. 197 (enacted Dec.17, 1792, ch. 103, § 14)
Lifting hand against white person	Whipping, no more than thirty lashes	p. 198 (enacted Dec. 17, 1792, ch. 103, § 14)
Giving of false testimony	The pillory, one hour; nailing of one ear; ear severed; repeat with other ear; whipping, thirty-nine lashes	p. 200 (enacted Dec. 17, 1792, ch. 103, § 17)

C. Infliction of Corporal Punishments at the End of the Eighteenth Century

Other bodily inflictions than those prescribed by the statutes cited above were sometimes used in the late eighteenth century.[1c] However, as the statutes reflect, the most

[1c] The "wooden horse," for example, was a straight, thin, horizontal pole which the culprit was set astride, sometimes with his legs weighted. Earle notes its inclusion in a sentence meted out at New Haven in 1787 (EARLE, CURIOUS PUNISHMENTS OF BYGONE DAYS (Reprint, 1969) [hereafter cited as EARLE], 131:

common of the corporal punishments (other than death) were whipping, the pillory, and minor mutilations, such as branding and the cropping or cutting off of ears.

Whipping was the great commonplace of penalties at the time of drafting and adoption of the Eighth Amendment: witness this accounting of the sentences imposed at a session of the Supreme Judicial Court of Massachusetts in Salem in 1786.

> "At the Supreme Judicial Court, holden in this town, for the county of Essex, which adjourned on Thursday last, several persons, criminally indicted, were convicted and severally sentenced. Isaac Coombs, an Indian, was found guilty, at last June term, at Ipswich, of murdering his wife; at which time a motion was made to the Court, in arrest of judgment, on which the Court suspended giving judgment thereon until this term; but the said motion being overruled, the Court gave judgment of death against him.
>
> "Besides the sentence of the Indian, as above, *Thomas Kendry*, for breaking into the store of Israel Bartlet, and stealing sundry goods, was sentenced, on his confession, to pay said Bartlet £33-9-6, to sit on the gallows one hour with a rope about his neck, to be whipped 30 stripes, and confined to hard labour on Castle-island two years.
>
> "*Thomas Atwood & John Ransum*, for breaking open the store of Knot Pedrick, and stealing dry fish, were each sentenced to pay said Pedrick £40-5-0, to sit one hour on the gallows, be whipped 36 stripes, and confined to labour on Castle-island 3 years.

"'Last Tuesday one James Brown, a transient person, was brought to the bar of the County Court on a complaint for horsestealing—being put to plead—plead guilty, and on Thursday received the sentence of the Court, that he shall be confined to the Goal in this County 8 weeks, to be whipped the first Day 15 stripes on the naked Body, and set an hour on the wooden horse, and on the first Monday each following Month be whipped ten stripes and set one hour each time on the wooden horse.'"

"*John Smith,* for stealing goods from Abner Perkinds, was sentenced to pay said Perkins £18-4-0, and be whipped 25 stripes.

"The same *John Smith,* for breaking open a sloop and stealing goods of John Brooks, was sentenced to pay said Brooks £16-8-0, to sit one hour on the gallows, be whipped 30 stripes, and confined 18 months on Castle-island.

"*John Scudder,* for stealing from Eli Gale, was sentenced to pay said Gale £5-2-0, or if unable to pay, to be disposed of by him, in service, to any person, for 2 months.[2c]

"*Joseph Ballard,* for stealing a horse from Thomas Dodge, was sentenced to pay £30, be whipped 20 stripes, pay costs, &c. and, if unable to pay, that said Dodge may dispose of him in service to any person for two years.

"*Calvin Newhall* was indicted for assaulting Deborah Sarker, a negro woman, with intent to commit a rape upon her. He pleaded not guilty; and the jury found him guilty of the assault, but whether with an intent to ravish they could not agree; whereupon the Attorney General would no further prosecute for said intent to ravish; and the Court ordered that said Calvin should be whipped 10 stripes, and recognize in £60, with sufficient surety in a like

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2c "It seems to have been quite common at one time to sell prisoners. At the Supreme Judicial Court in Salen, in November 1787, 'Elizabeth Leathe of Lynn, for harbouring thieves and receiving stolen goods, was convicted and sentenced to be whipped twenty stripes and to be sold for six months.' Also at a session of the same Court, held in Boston in September, 1791, six persons were convicted of theft and sentenced to be whipped and pay costs, or to be sold for periods of from six months to four years."

BROOKS, SOME STRANGE AND CURIOUS PUNISHMENTS (1886) [hereafter cited as BROOKS], 21-22.

sum, to be of good behaviour for 3 months, and pay costs."[3c]

The atmosphere of the whipping post is conveyed by these Boston scenes:

> "There was a whipping-post on Queen Street in Coston, another on the Common, another on State Street, and they were constantly in use in Boston in Revolutionary times. Samuel Breck wrote of the year 1771:
>
> "'The large whipping-post painted red stood conspicuously and prominently in the most public street in the town. It was placed in State Street directly under the windows of a great writing school which I frequented, and from there the scholars were indulged in the spectacle of all kinds of punishment suited to harden their hearts and brutalize their feelings. Here women were taken in a huge cage in which they were dragged on wheels from prison, and tied to the post with bare backs on which thirty or forty lashes were bestowed among the screams of the culprit and the uproar of the mob.'"

[3c]BROOKS 47-49. And see the following roster of sentences handed down at a session in Boston in 1784, *id.*, at 61-62:

> "At the Supreme Court held here on Thursday last, Direck Grout was tried for Burglary, and found guilty: sentence has not yet been passed upon him.
>
> "The following prisoners were also tried last week for various thefts, found guilty, and received sentence, viz.
>
> "Cornelius Arie, to be whipt 25 stripes, and set one hour on the gallows.
>
> "Thomas Joice, to be whipt 25 stripes, and branced.
>
> "William Scott, to be whipt 25 stripes, and set one hour on the gallows.
>
> "John Goodbread, and Edward Cooper, 15 stripes each.
>
> "James Campbell, to be whipt 30 stripes, and set one hour on the gallows.
>
> "Michael Tool, to be whipt 20 stripes.
>
> "Three notorious villains yet remain to be tried for burglary, and several others for theft."

"The diary of a Boston school-girl of twelve, little Anna Green Winslow, written the same year as Mr. Breck's account, gives a detailed account of the career of one Bet Smith, through workhouse and goal to whipping-post, and thence to be 'set on the gallows where she behaved with great impudence.'

"Criminals were sentenced in lots. On September 9, 1787, in one Boston court one burglar was sentenced to be hanged, five thieves to be whipped, two greater thieves to be set on the gallows, and one counterfeiter set on the pillory.

"Cowper's account of the tender-hearted beadle is supplemented by a similiar performance in Boston as shown in a Boston paper of August 11, 1789. Eleven culprits were to receive in one day the 'discipline of the post.' Another criminal was obtained by the Sheriff to inflict the punishment, but he persisted in being 'tender of strokes,' though ordered by the Sheriff to lay on. At last the Sheriff seized the whip and lashed the whipper, then turned to the row of ninepins and delivered the lashes. 'The citizens who were assembled complimented the Sheriff with three cheers for the manly determined manner in which he executed his duty.'"[4c]

The pillory "was an upright board, hinged or divisible in twain, with a hole in which the head was set fast, and usually with two openings also for the hands. Often the ears were nailed to the wood on either side of the head-hole."[5c] The following description of its place among the punishments of Newport indicates the nature of the penalty:

"'The public modes of punishment established by law were four, viz.: executions by hanging, whipping of men at the cart-tail, whipping of women in the jail-yard, and the elevation of counterfeiters and the like to a movable pillory, which turned on its base

[4c]EARLE 81-83.

[5c]EARLE 45-46.

so as to front north, south, east and west in succession, remaining at each point a quarter of an hour. During this execution of the majesty of the law the neck of the culprit was bent to a most uncomfortable curve, presenting a facial mark for those salutations of stale eggs which seemed to have been preserved for the occasion. The place selected for the infliction of this punishment was in front of the State House.'"[6c]

Penalties of mutilation apparently did not persist long after the turn of the nineteenth century in New England,[7c] but their use continued for several decades more in some areas of the country.[8c]

D. Banishment

Banishment is found infrequently upon the colonial statute books,[9c] but was used in practice in the Colonies and later in the States. Following English tradition, banishment was not principally a statutory matter in America.[10c]

[6c]EARLE 51-52.

[7c]One Hawkins had his ears cropped for forgery in Salem in 1801. EARLE 54; BROOKS 24.

[8c]Thompson, *Reforms in the Penal System of Tennessee*, 1 TENNESSEE HISTORICAL Q. 291, 294, 299 (1942).

[9c]See the Connecticut and Vermont provisions noted at pp. 1c, 14c *supra*. *Acts and Laws of the State of Connecticut in America*, printed by Elisha Babcock (Hartford, 1786) (1 vol.) p. 38; *Statutes of the State of Vermont, Revised and Established by Authority, in the year 1787, including those passed since that period until . . . January 1791*, printed by Anthony Haswell (Bennington, 1791) (1 vol.) p. 48.

[10c]In England, banishment can be traced to the Anglo-Saxon institutions of sanctuary and abjuration. See 3 HOLDSWORTH, HISTORY OF THE ENGLISH LAW (3d ed. 1903), 303-307. From the thirteenth century one who committed a crime could flee for refuge to a sanctuary. The coroner was then summoned to receive the criminal's confession. Upon taking an oath to adjure the kingdom, the criminal was allowed to proceed in safety to a port assigned to

Throughout the period prior to the middle of the last century, banishment was commonly imposed as a condition of executive pardons,[11c] and, less frequently, by specific

him. A large number of England's criminals voluntarily banished themselves in this manner rather than answer to the civil authorities for their crimes. See WHITE, LEGAL ANTIQUITIES (1913), 250. The procedure of sanctuary and abjuration was limited in the sixteenth century and finally abolished in 1623-1624. 3 HOLDSWORTH, *op. cit. supra*, at 306-307.

During the reign of Charles II, banishment began to be imposed through the device of conditional pardon. The King's pardoning power was extremely broad, and his right to impose conditions was unquestioned. See 6 *id.*, at 217-220. The original sentence could be revived upon a violation of the stipulations of its remission. The theory underlying a conditional pardon is similar to that of sanctuary and abjuration, and it would appear that the King's power to grant such pardons was a continuous development from the institutions of sanctuary and abjuration. Note, *Banishment—A Medieval Tactic in Modern Criminal Law*, 5 UTAH L. REV. 365, 368 (1957).

Before the abolition of sanctuary and abjuration, England had begun to transport criminals to penal colonies. Exile, or transportation, as the punishment was known, was first introduced by statute at the end of the seventeenth century. 2 HAWKINS, PLEAS OF THE CROWN (8th ed. 1824), 508. During the period of American colonization, this practice was adopted on a large scale. "After the establishment of English colonies in America, . . . it [transportation] became in this country . . . the most common sentence of criminals." *Ibid.*

Another form of statutory banishment had English roots. Beginning in the fourteenth century, Parliament passed bills of attainder, punishing persons by exile or death. See *Clarendon's Case*, 6 Howell St. Trials (Eng.) 291 (1667). CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787 (1956), 117.

Thus banishment was a complex institution in English law, imposed sometimes under general statutes, sometimes by particular bills, and sometimes in the exercise of the royal prerogative without statutory authorization.

[11c]See *People v. Potter*, 1 Parker Crim. Rep. 47, 56-57 (N.Y., Sup. Ct. 1846); *State v. Fuller*, 1 McCord 178 (S.C. 1821); *People v. Smith*, 1 Bailey 283 (S.C. 1829). The *Potter* opinion specifically traces the governor's power to pardon with banishment to the English tradition of sanctuary and abjuration, (1 Parker Crim. Rep., at 54), and sustains it by reference to settled usage. "[T]he governor may grant a pardon on a condition which does not subject the prisoner to an

legislative acts.[12c] These practices are found from the birth of the colonies[13c] through the constitutional period.[14c]

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unusual or cruel punishment. Banishment is neither. It is sanctioned by authority, and has been inflicted, in this form, from the foundation of our government (*Smith's Case*, 1 *Bailey, supra; James's Case*, 2 *Caines*, 57; *Pease's Case, in the Court of Errors*, 3 *John Ca.* 333; 2 Bailey, 516; 1 McCord, 178)." *Id.* at 56-57

[12c]In this Court, *Cooper v. Telfair*, 4 Dall. 314 (1800), upheld a banishment by the Georgia Legislature. The legislature had passed an act in 1782 banishing the plaintiff in error from the State and confiscating his property. Justice Patterson's opinion states that "the power of confiscation and banishment . . . is a power that grows out of the social compact, which must reside somewhere, and which is so inherent in the legislature that it cannot be divested or transferred, without an express provision of the constitution." *Id.* at 316. Justice Cushing adds: "The right to confiscate and banish, in the case of an offending citizen, must belong to every government." *Ibid.*

[13c]Banishment was employed as a punishment in America as early as 1636, when Anne Hutchinson was ". . . banished from out of our jurisdiction as being a woman not fit for our society." DOUGLAS, AN ALMANAC OF LIBERTY (1954), 135.

[14c]See note 11c *supra.*

APPENDIX D

SYNOPSIS OF THE CONSTITUTIONAL HISTORY OF THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT.

A. English Antecedents

The early English development of prohibitions against xcessive punishment, prior to and following Magna Carta,[1d] re canvassed in a recent article and need not be rehashed ere. Granucci, *"Nor Cruel and Unusual Punishments nflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 44-847 (1969) [hereafter cited as Granucci].

The first use of the phrase "cruel and unusual punishments" in English law appears in the Declaration of Rights nd the Bill of Rights of 1689.[2d] They recite, among the llegal acts committed by James II, that "excessive fines ave been imposed; and illegal and cruel punishments nflicted," and "for vindicating and asserting their ancient ights and liberties, declare . . . That excessive bail ought ot to be required nor excessive fines imposed nor cruel nd unusual punishment inflicted."[3d]

[1d]MAGNA CARTA, chs. 20-22 (1215).

[2d]The Declaration was proposed by a "convention" of the estates f the realm which met following the flight of James II. It was preented to William and Mary when they were tendered the crown and he new King and Queen assented to it. The bill was enacted shortly hereafter by the Convention Parliament and is identical to the eclaration but for the inclusion of some additional matter not relent here. MAITLAND, THE CONSTITUTIONAL HISTORY OF NGLAND (1913), 283-284; 3 HALLAM, CONSTITUTIONAL HISORY OF ENGLAND (Harper & Brothers ed. 1859), 547-549.

[3d]1 William and Mary, sess. 2, ch. 2, preamble, clause 10, printed ADAMS & STEPHENS, SELECT DOCUMENTS OF ENGLISH ONSTITUTIONAL HISTORY (1926), 462-465.

B. Developments in America

1. *Pre-Revolutionary Times*

A statute of the Massachusetts Colony predating the Declaration and Bill of Rights contains a prohibition on the use of cruel modes of punishment. Drafted by the Rev. Nathaniel Ward, a Puritan attorney and minister, the "Body of Liberties" was enacted in 1641 by the General Court.[4d] Clause 46 of the document reads: "For bodilie punishments we allow amongst us none that are inhumane Barbarous or cruel."[5d]

2. *State Constitutions 1776-1790*

Beginning in Virginia in early 1776, and continuing in rapid succession after the Declaration of Independence, constitutions were promulgated in all of the former thirteen colonies. Nine of these included prohibitions against cruel and unusual punishments, in general modeled closely after the formulation in the English Bill of Rights, but in some cases with additions.

George Mason's draft of the Constitution of Virginia with its Declaration of Rights was adopted, with minor changes, on June 12, 1776. Section 9 of the Declaration provides: "That excessive bail ought not to be required nor excessive fines imposed, nor cruel and unusual punishments inflicted,"[6d] a verbatim copy of the prohibition in the English Bill of Rights. In short order, like provisions were incorporated in

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[4d]WHITMORE, COLONIAL LAWS OF MASSACHUSETTS 1660-1672 (1889), 8. It has been suggested that Ward's proposal in this regard was derived from the earlier work of Sir Robert Beale in England. Granucci 848-851.

[5d]PERRY, SOURCES OF OUR LIBERTIES (1959), 153.

[6d]Virginia Constitution of 1776, Declaration of Rights, ¶9, 7 THORPE, FEDERAL AND STATE CONSTITUTIONS (1909), 3813 [hereafter cited as THORPE].

the new constitution of Delaware,[7d] North Carolina,[8d] Maryland,[9d] Pennsylvania,[10d] South Carolina,[11d] and Massachusetts.[12d] The South Carolina Constitution of 1778 included a directive to the legislature to reform the penal code so that punishments may be made "less sanguinary, and in general more proportionate to the crime."[13d] The New Hampshire Constitution, not adopted until 1784, also contained in addition to the then standard cruel and unusual punishment clause[14d] a lengthy statement on the importance of proportioning penalties and enacting humane penal laws.[15d] Vermont, which did not include a "cruel and

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[7d]Delaware Declaration of Rights of 1776, § 16, 1 DEL. CODE ANN. (1953), 83.

[8d]North Carolina Constitution of 1776, § 10, 5 THORPE 2788.

[9d]Maryland Constitution of 1776, § 22, 3 THORPE 1688; see also *id.* § 14: "That sanguinary laws ought to be avoided, as far as is consistent with the safety of the state: and no law, to inflict cruel and unusual pains and penalties, ought to be made in any case, or at any time hereafter."

[10d]Pennsylvania Constitution of 1790, Art. 9, § 13, 5 THORPE 3101: "... nor cruel punishments inflicted."

[11d]South Carolina Constitution of 1790, Art. 9, § 4, 6 THORPE 3264: "... nor cruel punishments inflicted."

[12d]Massachusetts Constitution of 1780, Art. 26, 3 THORPE 1892.

[13d]South Carolina Constitution of 1778, § 40, 6 THORPE 3257.

[14d]New Hampshire Constitution of 1784, § 33, 4 THORPE 2457.

[15d]*Id.*, § 18, 4 THORPE 2456: "All penalties ought to be proportioned to the nature of the offence. No wise legislature will affix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason; where the same undistinguishing severity is exerted against all offences, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do those of the lightest dye: For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate, mankind."

unusual punishment" prohibition, did direct the development of prisons in order to permit lesser reliance on sanguinary punishments.[16d]

3. *The Federal Constitution*

Although the Articles of Confederation contained no provisions for the protection of individual liberties, the Northwest Ordinance, enacted by the Confederate Congress in 1787, did provide such guarantees for the citizens of the Northwest Territory, and included a prohibition of cruel and unusual punishments.[17d]

The Federal Constitution proposed in 1787 contained no bill of rights, of course, and this omission was the subject of well-known discussions in the ratifying conventions of the States. Three of the States in which the strongest sentiments was expressed of the need for the addition to the Constitution of a body of protections of individual liberties–Virginia,[18d] New York,[19d] and North Carolina[20d]–submitted proposals for specific bill of rights guarantees which included

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[16d]Vermont Constitution of 1777, Chap. 2, Sec. 35, 6 THORPE 3747: "To deter more effectually from the commission of crimes, by continued visible punishment of long duration, and to make sanguinary punishments less necessary; houses ought to be provided for punishing, by hard labor, those who shall be convicted of crimes not capital...."

[17d]Ordinance of 1787: The Northwest Territorial Government, The Confederate Congress, July 13, 1787; Art. II: "All fines shall be moderate; and no cruel or unusual punishments shall be inflicted." 1 U.S.C. (1964), xxxvii, xxxviii.

[18d]See 3 ELLIOT'S DEBATES (2d ed. 1863), 593-596, 612-613, 622-631, 649-652.

[19d]1 ELLIOT'S DEBATES (2d ed. 1863), 329.

[20d]4 ELLIOT'S DEBATES (2d ed. 1863), 242.

bitions of the imposition of cruel and unusual punish-
.[21d]

e debates in two of the state conventions specifically
ed to the absence of such a clause in the original Con-
ion. In Massachusetts, Mr. Holmes stated:

> "What gives an additional glare of horror to these gloomy circumstances is the consideration, that Congress have to ascertain, point out, and determine, what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline."[22d]

the Virginia Convention, a colloquy among Patrick
, George Nicholas and George Mason touched on the
:

> Henry: "Congress, from their general powers, may fully go into business of human legislation. They may legislate, in criminal cases, from treason to the lowest offence—petty larcency. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives. What says our bill of rights?—'that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' Are you not, therefore, now calling on those gentlemen who are to compose Congress, to prescribe trials and define punishments without this control? Will they find sentiments there

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ELLIOT'S DEBATES (2d ed. 1863), 658 (Virginia); 1 *id.* lew York); 4 *id.* 244 (North Carolina).

ELLIOT'S DEBATES (2d ed. 1863), 111.

similar to this bill of rights? You let them loose; you do more–you depart from the genius of your country."

• • • • •

"In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors? –That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany–of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone."[23d]

Nicholas: "But the gentlemen says that, by this Constitution, they have the power to make laws to define crimes and prescribe punishments; and that consequently, we are not free from torture. . . . If we had no security against torture but our declaration of rights, we might be tortured to-morrow; for it has been repeatedly infringed and disregarded."[24d]

"Mr. GEORGE MASON replied that the worthy gentleman was mistaken in his assertion that the bill of rights did not prohibit torture; for that one clause expressly provided that no man can give evidence against himself; and that the worthy gentleman must know that, in those countries where torture is used, evidence was extorted from the criminal himself.

[23d]3 ELLIOT'S DEBATES (2d ed. 1863), 447-48.

[24d]3 *id.* at 451.

Another clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, torture was included in the prohibition.

"Mr. NICHOLAS acknowledged the bill of rights to contain that prohibition, and that the gentleman was right with respect to the practice of extorting confession from the criminal in those countries where torture is used; but still he saw no security arising from the bill of rights as separate from the Constitution, for that it had been frequently violated with impunity."[25d]

In the debates of the first Congress on the Bill of Rights, there was very little discussion of the provision which has become the Eighth Amendment, and that only in the House of Representatives. Here is the whole of it:

"Mr. Smith, of South Carolina, objected to the words 'nor cruel and unusual punishments,' the import of them being too indefinite."

"Mr. Livermore: 'The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it would be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.'

[25d] 3 *Id.* at 452.

"The question was put on the clause, and it was agreed to by a considerable majority."[26d]

Examination of the debates in the state legislatures concerning the ratification of the Bill of Rights has revealed no extant reference to the Clause.

[26d] 1 Annals of Congress (1789), 754 (1st Congress, 1st Session).

APPENDIX E

WORLDWIDE AND NATIONAL TRENDS IN THE USE OF THE DEATH PENALTY

In a report for the United Nations Department of Economic and Social Affairs describing developments in the use of the death penalty during the years 1961 to 1965, Professor Norval Morris summarized his findings as follows:

> ". . . There is an over-all tendency in the world towards fewer executions. This is the result of less frequent use of the death penalty in those States whose statutes provide for that penalty, and of a steady movement towards legislative abolition of capital punishment." [1e]

In a 1971 supplemental report to the Economic and Social Council, the Secretary-General of the United Nations concluded:

> ". . . There is still a clear trend towards total abolition. Most countries are gradually restricting the number of offences for which the death penalty can be applied and a few have totally abolished capital offences even in wartime. Those countries retaining the death penalty report that in practice it is only exceptionally applied and frequently the persons condemned are later pardoned by executive authority. . . ." [2e]

A variety of factors hamper somewhat any attempt to generalize upon the data summarized by these statements. No study has successfully sought data from all jurisdictions competent to retain or abolish capital punishment; many

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[1e]UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) (1968) [hereafter cited as UNITED NATIONS], 81-82.

[2e]UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, Note by the Secretary-General, *Capital Punishment*, (E/4947) (February 23, 1971) [hereafter cited as Secretary-General's Note], p. 3.

otherwise abolitionist jurisdiction retain the death penalty for extraordinary offenses or emergency circumstances; several jurisdictions have failed to reflect *de facto* abolition in positive law.[3e] A consideration of trends over the last two centuries, moreover, is complicated by the movements of several jurisdictions which have abolished the death penalty and subsequently reintroduced it.

Nonetheless, when these vacillating movements are put out of account by focusing upon countries which have abolished capital punishment and never restored it (and when "abolition" is used to mean the termination of capital punishment for the ordinary violent civilian crimes: murder, rape, robbery, arson, and kidnapping), definite historical trends are clearly apparent.

Table I lists abolitionist jurisdictions outside the United States by year of *de jure* abolition, except for Lichtenstein, Luxembourg, Nicaragua, and Surinam, for which the last execution year is given to mark the beginning of *de facto* abolition.[4e]

[3e]See UNITED NATIONS 8-9; Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. CRIM. L., CRIM & POL. SCI. 397, 405 (1965) [hereafter cited as Patrick].

[4e]Nine of the listed jurisdictions retain execution as the penalty for certain extraordinary civil offenses (the four Australian jurisdictions, Canada, Israel, Nepal, New Zealand, and United Kingdom); eight permit the death penalty in wartime or under military law (Brazil, Denmark, Finland, Italy, Netherlands, Norway, Sweden and Switzerland); and two executed Nazi collaborators after World War II (Netherlands and Norway).

TABLE I[5e]

Worldwide Abolition

ARGENTINA	1922	LICHTENSTEIN	1798[7e]
AUSTRALIA (Federal)	1945	LUXEMBOURG	1821[7e 9e]
New South Wales	1955	MEXICO (Federal)	1931
Queensland	1922	29 of 32 States	1931-1970
Tasmania	1968	MONACO	1962
AUSTRIA	1968	MOZAMBIQUE	1867
BELGIUM	1863[6e]	NEPAL	1950
BOLIVIA	1961	NETHERLANDS	1886
BRAZIL	1946	Antilles	1957
CANADA	1967[8e]	NEW ZEALAND	1961
COLUMBIA	1910	NICARAGUA	1892[7e]
COSTA RICA	1880	NORWAY	1905
DENMARK	1930	PANAMA	1915
DOMINICAN REPUBLIC	1924	PORTUGAL	1867
ECUADOR	1897	SAN MARINO	1848
FINLAND	1949	SURINAM	1927[7e]
GERMANY, West	1949	SWEDEN	1921
GREENLAND	1954	SWITZERLAND	1942
HONDURAS	1957	UNITED KINGDOM	
ICELAND	1940	Great Britain	1965
INDIA		Northern Ireland	1966
Travencore	1944	URUGUAY	1907
ISRAEL	1954	VATICAN CITY STATE	1969
ITALY	1944	VENEZUELA	1863

[5e]Sources for this table are: UNITED NATIONS; Secretary-General's Note; ANCEL, THE DEATH PENALTY IN EUROPEAN COUNTRIES (Council of Europe, European Committee on Crime Problems, 1962); JOYCE, CAPITAL PUNISHMENT: A WORLD VIEW (1961); UNIVERSITY OF COIMBRA, FACULTY OF LAW, PANA DE MORTE (1967); Patrick.

[6e]Excludes one soldier executed in 1918.

[7e]*De facto* only; date is last execution.

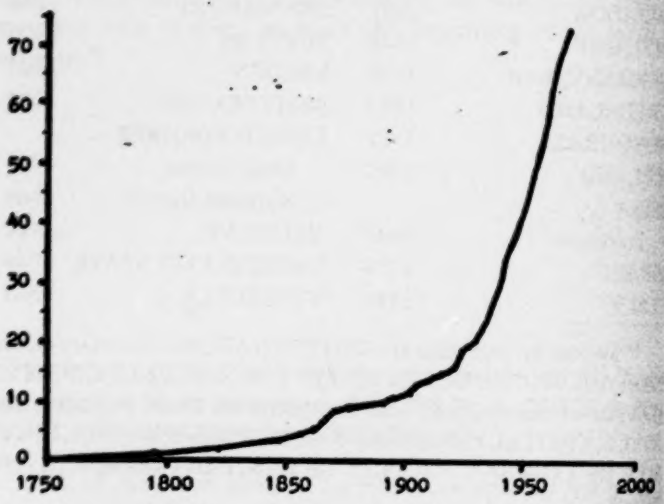
[8e]Statute abolishing capital punishment for murder expires after a five-year period (beginning 1967) if not renewed.

[9e]Excludes one.

Chart I displays the data contained in Table I. Although, as of 1970, abolitionist jurisdictions comprise far less than half of all the nations of the world, there is evident a definite, continuing, long-term, accelerating, worldwide trend toward ending the use of the penalty of death. Every decade since 1800 has shown growth in the total number of abolitionist jurisdictions; and during the past century the number of jurisdictions abandoning capital punishment in any given decade has been greater than the number in the preceding decade.

CHART I

Worldwide Abolition Graph



A similar trend is apparent within the United States. Table II lists by date of *de jure* abolition those States which are presently abolitionist.

TABLE II[10e]

Abolition in the United States

ALASKA	1957	NORTH DAKOTA	1915[14e]
HAWAII	1957	OREGON	1964
IOWA	1965	PUERTO RICO	1929
MAINE	1887	RHODE ISLAND	1852[15e]
MICHIGAN	1847[11e]	VERMONT	1965[12e]
MINNESOTA	1911	VIRGIN ISLANDS	1957
NEW MEXICO	1969[12e]	WEST VIRGINIA	1965
NEW YORK	1965[13e]	WISCONSIN	1853

The information in Table II is exhibited by the solid line on Chart II. Unlike the situation outside the United States, jurisdictions which have reinstated capital punishment after periods of abolition substantially affect the curve: the broken line on Chart II includes eight States now having the death penalty which underwent periods of abolition,[16e]

[10e]Sources for this table are: Appendix G to this brief; UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 45, *Capital Punishment* 1930-1968 (August 1969), p. 30; 34 LAWS OF PUERTO RICO ANN., § 995 (1956); VIRGIN ISLANDS CODE ANN., tit. 14, 923 (1964).

[11e]Death penalty retained for treason until 1963.

[12e]Death penalty retained for murder of police officer or prison guard, or for commission of second unrelated murder.

[13e]Death penalty retianed for murder of police officer and for any homicide by life-term prisoner.

[14e]Death penalty retained for treason and for murder by life-term prisoner incarcerated for murder.

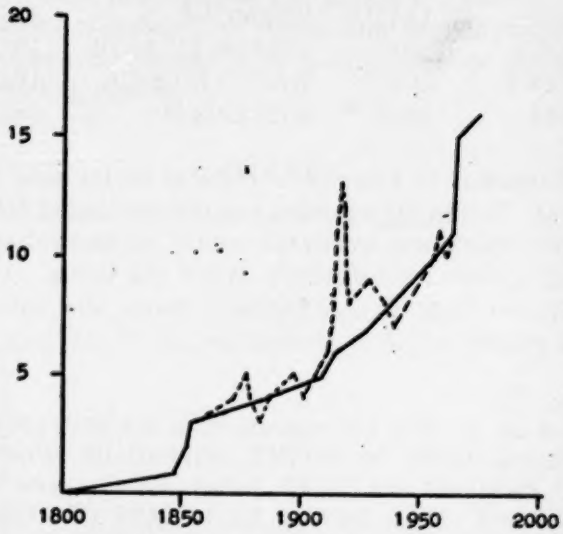
[15e]Death penalty retained for murder by life-term prisoner.

[16e]Arizona (1916-1918); Colorado (1897-1901); Delaware (1958-1961); Kansas (1907-1935); Missouri (1917-1919); South Dakota (1915-1939); Tennessee (1916-1918); Washington (1912-1919).

as well as three presently abolitionist States which had earlier periods of abolition than those shown in Table II.[17e]

CHART II

United States Abolition Graph



Although short-lived periods of abolition in five States in the decade preceding Prohibition[18e] blur the impact of the otherwise definitive trend reflected in Chart II, that trend is compellingly reflected in the number of executions per year as shown by Chart III. Chart III displays the information contained in the Table on p. 37 of the body of this brief, and demonstrates the solidity of the conclusion that "while de jure abolition has ebbed and flowed a de facto abolition has practically become a reality in the United

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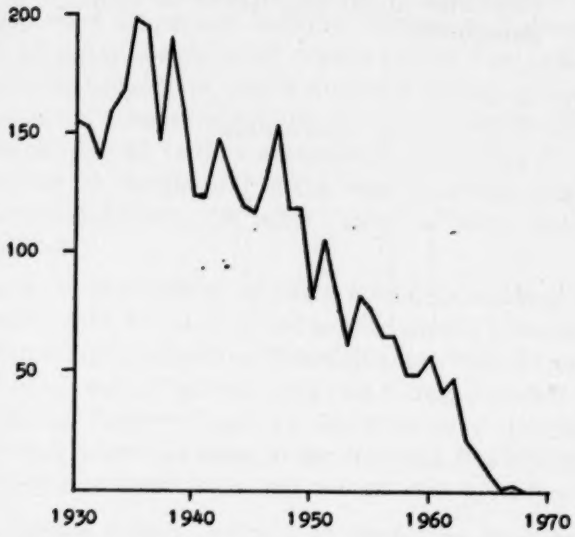
[17e] Iowa (1872-1878); Maine (1876-1883); Oregon (1914-1920).

[18e] Arizona, Missouri, Oregon, Tennessee and Washington. See notes 14e, 15e *supra*.

States."[19e] This is a Chart of the number of men actually executed yearly since 1930.

CHART III

Executions in the United States
1930-1970



In summary:

(1) Among Western European countries outside the Soviet orbit, only France and Spain still authorize the death penalty for murder and other felonies in peacetime.

(2) In the Western Hemisphere, the United States stands virtually alone in using the death penalty. In North America, out of 98 jurisdictions (12 in Canada, 32 in Mexico, and 54 in the United States), 38 of the 41 which allow capital punishment for first degree murder generally are in the United States.

[19e]2 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS (G.P.O. 1970), 1350-1351.

(3) In the Anglo-American world (United Kingdom, Canada, Australia, United States), whose jurisprudence is rooted in a common experience several centuries old, the death penalty for crimes such as murder, rape, and kidnapping is all but abolished outside the United States. Except for the 38 jurisdictions which retain the death penalty in this country, only the Republic of Ireland and four Australian states have failed to abandon capital punishment.

APPENDIX F

AVAILABLE INFORMATION RELATING TO THE PROPORTION OF PERSONS ACTUALLY SENTENCED TO DEATH AMONG THOSE CONVICTED OF CAPITAL CRIMES.

It is exceptionally difficult to obtain information which ll permit construction of a reliable estimate concerning e proportion of persons actually sentenced to death,[1f] ong all those convicted of capital crimes. In order to lculate this proportion, two comparable figures are required: e number of persons convicted of a given capital offense, d the number of persons sentenced to death for it. The ures must be *comparable* in the sense that they relate to e same jurisdiction, the same period of time, and the ne offense.

Figures for the number of death sentences imposed dur- recent years, for each of the several capital offenses, in h of the capital-punishment jurisdictions, may be esti- ted—albeit somewhat inexactly—from data reported in National Prisoner Statistics Bulletins on *Executions.* e relevant tables are cited in the footnote,[2f] which also s forth the citation form that will be used hereafter to

[1f] By "persons actually sentenced to death," we mean persons n whom the sentencing authority, judge or jury, imposes a death ence. We do not mean to take account of later judicial decisions ting the sentence, of executive clemency, or of any other factor may result in the initial death sentence not being carried out.

[2f] The National Prisoner Statistics Bulletins on *Executions* are ished annually. The latest is UNITED STATES DEPARTMENT JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STA- TICS, No. 45, *Capital Punishment* 1930-1968 (August, 1969). In columns below we list the numbers and titles of the issues relied in this Appendix, the abbreviation which will hereafter be used signate each, and the pages and tables of each that contain perti- information.

ber, title, date	Abbreviation	Page and table
28, Executions (April, 1962)	NPS (1961)	p. unnumbered table 5

describe each bulletin. There are several problems with th tables as sources of information relating to the number of persons sentenced to death. First, the figure which they report represents the number of persons received by the respective state penitentiaries from the court, each year, under sentence of death. This may be fewer than the actual number of death sentences imposed in some states, where the practice is to hold a death-sentenced man in a local facility pending post-verdict motions and/or appeals. Second, for this or other reasons, a few death sentences imposed each year are not reported to the NPS until the following year. The latest NPS Bulletin gives revised figur for prisoners received from court under sentence of death for each year since 1961 (NPS (1968), p. 12, table 4); but these figures are not broken down by jurisdiction and offense. Figures broken down by jurisdiction and offense must be taken from the earlier annual reports, and have no been revised.

But these problems are inconsequential compared to thos of ascertaining comparable figures relating to the number o convictions for capital offenses. Conviction figures are almost nowhere published. The rare published figures suff from assorted woes that virtually destroy their usefulness.

No. 32, Executions 1962 (April, 1963)	NPS (1962)	p. unnumbered, table 5
No. 34, Executions 1930-1963 (May, 1964)	NPS (1963)	p. 14, table 5
No. 37, Executions 1930-1964 (April, 1964 [sic: 1965])	NPS (1964)	p. 14, table 4
No. 39, Executions 1930-1965 (June, 1966)	NPS (1965)	p. 14, table 4
No. 41, Executions 1930-1966 (April, 1967)	NPS (1966)	p. 13, table 4
No. 42, Executions 1930-1967 (June 1968)	NPS (1967)	pp. 12-17, tables 4-7
No. 45, Capital Punishment 1930-1968 (August, 1969)	NPS (1968)	pp. 12-17, tables 4-7

Some states report judicial statistics for fiscal years, making comparison with the calendar-year NPS reports difficult Most states report conviction figures for categories of cases ("murder"; "sexual offenses") that include, but are not entirely composed of, capital crimes. Many states report not conviction figures, but figures concerning the number of commitments to the state penitentiary under conviction and sentence for given offenses. These figures omit large numbers of convicted persons: namely, those sentenced to imprisonment in local facilities, or to probation, or whose sentences are suspended. Secondary sources reporting conviction figures suffer from the same defects and often, in addition, they report totals for a span of years that includes both a period of mandatory capital sentencing and a succeeding period of discretionary capital sentencing within a jurisdiction.

Confronted with these problems, we adopt the approach of setting out below all of the information we can find relating to the question of what proportion among all convicted capital offenders are actually sentenced to death. The information comes from a variety of problems. We report each item separately, and explain its problems as we see them. The information below relates to the two capital offenses principally in use in the United States: murder and rape. Information on other capital offenses is not obtainable in intelligible form.

A. Murder

1. In the federal courts, first degree murder is capitally punishable under 18 U.S.C. §1111 (1964). For all federal district courts (excluding the District of Columbia, Canal Zone, Guam and the Virgin Islands), there appear to have been a total of 25 convictions for this offense between July 1, 1961 and June 30, 1969, excluding the fiscal year 1964-1965, for which no figure is reported. During the calendar years 1961 through 1969, 2 death sentences were imposed by federal courts for murder. Note that the death-sentence

figure relates to a period of nine years, including the seven for which the conviction figure is given. This awkard form of comparison is necessitated by the problem of relating calendar to fiscal years. Conviction figures are taken from table D5 in the Annual Reports of the Director of the Administrative Office of the United States Courts for the years 1962-1969; death-sentence figures from NPS (1961) through NPS (1968).[3f]

2. It appears that in the five calendar years 1966 through 1970, 42 persons were sentenced upon conviction of first degree murder in the United States District Court for the District of Columbia. During this period one person was sentenced to die for murder. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, DIVISION OF PROCEDURAL STUDIES AND STATISTICS, NUMBER OF PERSONS SENTENCED FOR CRIMES WHICH INCLUDE THE DEATH SENTENCE AS A PENALTY SECTION: FISCAL YEARS 1966-1970 (unpublished Report, August 10, 1971).

3. Writing in 1964, the former Director of the California Department of Corrections estimated that one-fifth of California's first-degree murder convicts were sentenced to death. McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 FED. PROBATION (No. 2) 11, 12 (1964). The Bureau of Criminal Statistics reports 88 first degree murder convictions during 1967, as compared with 17 death sentences. STATE OF CALIFORNIA, DEPARTMENT OF JUSTICE, DIVISION OF LAW ENFORCEMENT, BUREAU OF CRIMINAL STATISTICS, REPORT (CRIME AND DELINQUENCY IN CALIFORNIA, 1967) (1968) 140; NPS (1967). During 1969, there were 87 first-degree murder

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[3f]The last published figures for death sentences cover the period through December 31, 1968. Our information that no federal death sentences were imposed for murder during calendar year 1969 is based upon a communication from James A. McCafferty, Assistant Chief, Division of Procedural Studies and Statistics, Administrative Office of the United States Courts, August 11, 1971.

convictions, and 8 death sentences. STATE OF CALIFORNIA, DEPARTMENT OF JUSTICE, DIVISION OF LAW ENFORCEMENT, BUREAU OF CRIMINAL STATISTICS, REPORT (CRIME AND DELINQUENCY IN CALIFORNIA, 1969) (1970) 121. For other recent years, we are unable to discover published reports of the number of first-degree murder convictions, since the conviction figure is stated for homicide generically.

4. There appear to have been 78 commitments under conviction for first degree murder in Florida between July 1, 1964 and June 30, 1966. During the three calendar years encompassing these two fiscal years, 16 men were sentenced to die for first degree murder. FLORIDA DIVISION OF CORRECTIONS, FIFTH BIENNIAL REPORT (July 1, 1964-June 30, 1966) (1966) 74-75; NPS (1964); *id.* (1965); *id.* (1966). For the period between July 1, 1966 and June 30, 1970, there were 164 life sentences and 29 death sentences imposed for first degree murder in Florida. FLORIDA DIVISION OF CORRECTIONS, SEVENTH BIENNIAL REPORT (July 1, 1968 to June 30, 1970) (1970) 82; *id.*, SIXTH BIENNIAL REPORT (July 1, 1966 to June 30, 1968) (1968) 77.

5. There appear to have been 424 commitments under conviction for murder in Georgia between July 1, 1964 and December 31, 1968. During the five calendar years encompassing these four and a half fiscal years, 14 men were sentenced to die for murder. (During these years all murder was capital in Georgia, which recognized no degrees of the offense.) STATE OF GEORGIA BOARD OF CORRECTIONS, ANNUAL REPORT (July 1, 1964-June 30, 1965) (1965) 56; *id.* (July 1, 1965-June 30, 1966) (1966) 52; *id.* (July 1, 1966-June 30, 1967) (1967) 39; *id.* (July 1, 1967-June 30, 1968) (1968) 45; *id.* (July 1, 1968-June 30, 1969) (1969) 101; NPS (1964); *id.* (1965); *id.* (1966); *id.* (1967); *id.* (1968).

6. There appear to have been 28 commitments under conviction for first degree murder in Maryland between

July 1, 1965 and June 30, 1966. During the two calenda years encompassing that one fiscal year, 4 men were sentenced to die for first degree murder. MARYLAND DEPARTMENT OF CORRECTION, FORTIETH REPORT (July 1, 1965-June 30, 1966) (1966) 36; NPS (1965); *id.* (1966). Again between July 1, 1967 and June 30, 1968, there were 28 first degree murder commitments. During the two calendar years encompassing that fiscal year, 3 m were sentenced to die for first degree murder. MARYLAND DEPARTMENT OF CORRECTIONAL SERVICES, FORT SECOND REPORT (July 1, 1967-June 30, 1969) (1969), unpaginated; NPS (1967); *id.* (1968).

7. Bedau reports that in New Jersey, between 1916 an 1955, 497 persons were committed to the state penitentiar with life sentences for murder, while 157 persons were sentenced to death for murder. (These are all first degree cases, it would appear, since New Jersey law does not permit life imprisonment for second degree murder. The death penalty for first degree murder was made discretionary in 1916.) The problem here is that the figures for conviction include both jury convictions (entailing jury discretion to sentence to life or death) and court convictions upon a plea of *non vult* (which, under New Jersey law throughout the period, precluded the death penalty). Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 30 (1964) Between 1956 and 1960 in New Jersey, Bedau finds 61 first degree murder convictions, resulting in 13 death sentences and 48 life sentences (17 on a jury verdict and 31 on a plea of *non vult*). *Id.* at 51.[4f] These figures may relate only to male convicts, since Bedau received his conviction figures from Edwin Wolf (see next paragraph), who studied the prison records of convicted male offenders.

Wolf reports that of 159 convictions by a jury of a mal offender for the offense of first degree murder in New Jer-

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[4f]The figure "60" in the lower right-hand cell of table XXVII ought to be "61." This is so because the figure "4" in the last colum for the year 1958 is a typographical error and should read "5."

sey between 1937 and 1961, 62 resulted in a death sentence and 97 in a sentence of life imprisonment. Wolf, *Abstract of Analysis of Jury Sentencing in Capital Cases: New Jersey: 1937-1961*, 19 RUTGERS L. REV. 56, 60 (1964).

8. Johnson reports that in North Carolina, between July 1, 1938 and December 31, 1953, there were 742 convictions for first degree murder, as compared with 162 death sentences (admissions to death row) upon conviction for first degree murder. Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165, 166 (1957).

9. It appears that in Ohio there were 183 convictions for first degree murder during the calendar years 1965-1968. In this same period 32 men were sentenced to die for first degree murder. OHIO DEPARTMENT OF MENTAL HYGIENE AND CORRECTION, OHIO JUDICIAL CRIMINAL STATISTICS (1965) 13; *id.* (1966) 11; *id.* (1967) 11; *id.* (1968) 13; NPS (1965); *id.* (1966); *id.* (1967); *id.* (1968).

10. Wolfgang reports that in Philadelphia, Pennsylvania during the period 1948-1952 there were 77 convictions of first degree murder, as compared with 7 death sentences. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE (Science ed., Wiley, 1966) 305-306, table 36.

11. It appears that there were 71 commitments under conviction for first degree murder in Tennessee during fiscal years July 1, 1965-June 30, 1968. During the four calendar years encompassing these three fiscal years one man in Tennessee was sentenced to die for first degree murder. TENNESSEE DEPARTMENT OF CORRECTION, DEPARTMENTAL REPORT (1965-1966, 1966-1967) (1968) pages unnumbered; *id.* (PERIOD ENDING JUNE 30, 1969) (1969) pages unnumbered; NPS (1965); *id.* (1966); *id.* (1967); *id.* (1968).

12. It appears that during calendar years 1946 through 1968, 5034 persons were committed under sentence for murder in Texas. (Texas has no degrees of murder.) During this period, 139 persons were sentenced to die for mur-

der. Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 CRIME & DELINQUENCY 132, 135 (1969); TEXAS DEPARTMENT OF CORRECTIONS, BUREAU OF RECORDS AND IDENTIFICATION, ANNUAL STATISTICAL REPORT, 1968 (1969), unpaginated; NPS (1968).

13. Kalven and Ziesel report 21 death sentences out of a sample of 111 murder cases tried in the years 1954, 1955 and 1958 in which a jury returned a verdict of guilty of a capital degree of the offense, and the presiding judge agreed with their guilty verdict. KALVEN & ZEISEL, THE AMERICAN JURY (1966) 435-436.

B. Rape

1. In the federal courts, rape is capitally punishable under 18 U.S.C. §2031 (1964). For all federal district courts (excluding the District of Columbia, Canal Zone, Guam and the Virgin Islands), there appear to have been a total of 185 rape convictions between July 1, 1961 and June 30, 1969, excluding the fiscal year 1964-1965, for which no figure is reported. For the calendar years 1961 through 1969, no death sentences were imposed for rape by a federal court. Conviction figures are taken from table D5 in the Annual Reports of the Director of the Administrative Office of the United States Courts for the years 1962-1969; death-sentence figures from NPS (1961) through NPS (1968).[5f]

2. There appear to have been 185 commitments under conviction for capital rape offenses in Florida between July 1, 1964 and June 30, 1968. During the five calendar years encompassing these four fiscal years, 8 men were sentenced to die for rape. FLORIDA DIVISION OF CORRECTIONS, FIFTH BIENNIAL REPORT (July 1, 1964-June 30, 1966) (1966) 74-75; *id.*, SIXTH BIENNIAL REPORT (July 1, 1966 to June 30, 1968) (1968) 77; NPS (1964); *id.* (1965);

[5f]No death sentences were imposed for rape during the last six months of 1969 that are uncovered by the published figures. See note 3f *supra*.

id. (1966); *id.* (1967); *id.* (1968). During the two year period between July 1, 1968 and June 30, 1970, there appear to have been 148 commitments under conviction for capital rape offenses. FLORIDA DIVISION OF CORRECTIONS, SEVENTH BIENNIAL REPORT (July 1, 1968 to June 30, 1970) (1970) 83. No more than 6 death sentences were imposed.[6f]

3. There appear to have been 299 commitments under conviction for rape in Georgia between July 1, 1964 and December 31, 1968. During the five calendar years encompassing these four and a half fiscal years, 8 men were sentenced to die for rape. STATE OF GEORGIA BOARD OF CORRECTIONS, ANNUAL REPORT (July 1, 1964-June 30, 1965) (1965) 56; *id.* (July 1, 1965-June 30, 1966) (1966) 52; *id.* (July 1, 1966-June 30, 1967) (1967) 39; *id.* (July 1, 1967-June 30, 1968) (1968) 45; *id.* (July 1, 1968-June 30, 1969) (1969) 101; NPS (1964); *id.* (1965); *id.* (1966); *id.* (1967); *id.* (1968).

4. There appear to have been 190 commitments under conviction for rape and assault with intent to rape in Maryland between July 1, 1964 and June 30, 1966. During the three calendar years encompassing those two fiscal years, 3 men were sentenced to die for rape offenses. MARYLAND DEPARTMENT OF CORRECTION, THIRTY-NINTH REPORT (July 1, 1964-June 30, 1965) (1965) 30; *id.*, FORTIETH REPORT (July 1, 1965-June 30, 1966) (1966) 36; NPS (1964); *id.* (1965); *id.* (1966). There appear to have been 102 commitments for rape offenses for the fiscal year July 1, 1967 through June 30, 1968, with no death sentences. MARYLAND DEPARTMENT OF CORRECTIONAL SERVICES, FORTY-SECOND REPORT (July 1, 1967-June 30, 1969) (1969), unpaginated; NPS (1967); *id.* (1968).

[6f]A total of 19 commitments under sentence of death are reported in Florida for the fiscal years 1968-1970. *Id.* at 81. Since 13 of these were for murder (see p. 5f *supra*) no more than 6 could have been for rape.

(During all these years, rape and assault with intent to rape were capital in Maryland.)

5. Johnson reports that in North Carolina, between July 1, 1938 and December 31, 1953, there were 382 convictions for rape, as compared with 52 death sentences (admissions to death row) upon conviction for rape. The conviction figure seems unduly low, even considering the availability to the jury of verdicts for lesser offenses. Johnson, *Selective Factors in Capital Punishment,* 36 SOCIAL FORCES 165, 166 (1957).

6. It appears that there were 63 commitments under conviction for rape in Tennessee during fiscal years July 1, 1965-June 30, 1968. During the four calendar years encompassing these three fiscal years there were 7 men sentenced to die for rape. TENNESSEE DEPARTMENT OF CORRECTION, DEPARTMENTAL REPORT (1965-1966, 1966-1967) (1968), pages unnumbered; *id.*, (PERIOD ENDING JUNE 30, 1969) (1969), pages unnumbered; NPS (1965); *id.* (1966); *id.* (1967); *id.* (1968).

7. Partington appears to say that, between 1908 and 1963, there were 2798 offenders committed to the Virginia State Penitentiary upon convictions for the capital crimes of rape, attempted rape, statutory rape, and attempted statutory rape. There were 68 death sentences in this group, including two imposed upon defendants who had been convicted of capital robbery as well as the sexual offense. For rape alone, there were 1595 commitments, including 41 death sentences. The principal problem with these figures appears to be that the commitment figures are doubtless considerably lower than the number of capital convictions, since some capital offenders would have received jail terms, probation, or suspended sentences. Partington, *The Incidence of the Death Penalty for Rape in Virginia,* 22 WASH. & LEE L. REV. 43, 43-44, 71-73 (1965).

In addition to the figures available for comparison, *supra,* national totals of commitments under sentence of death are reported. These alone give some sense of the extreme infre-

quency with which persons convicted of capital crimes are actually sentenced to death. During the period covered by the following figures, thirty-nine American States, the District of Columbia, and the federal jurisdiction maintained statutes of general applicability punishing one or more offenses with death. In some States, half a dozen or more crimes were so punishable.[71] Yet the following numbers of men were received under sentence of death in all of the prisons of the United States in the following years (NPS (1968), p. 12, table 4):

1961 - 140
1962 - 103
1963 - 93
1964 - 106
1965 - 86
1966 - 118
1967 - 85
1968 - 102

[71]The capital statutes now in force in the United States are set forth in Appendix G to this brief, *infra*. Some of those in force during the period 1961-1968 have, however, since been repealed.

APPENDIX G

PROVISIONS OF THE CRIMINAL STATUTES OF THE UNITED STATES AND OF THE FIFTY STATES PROVIDING FOR THE PUNISHMENT OF DEATH*

United States

Uniform Code of Military Justice (10 U.S.C., subtit. A, ch. 47):

§ 885 (desertion)
§ 890 (assaulting or willfully disobeying a superior commissioned officer)
§ 894 (mutiny or sedition)
§ 899 (misbehavior before the enemy)
§ 901 (improper use of countersign)
§ 904 (aiding the enemy)
§ 906 (spies)
§ 913 (misbehavior of sentinel)
§ 918 (murder)
§ 920 (rape)

Crimes (18 U.S.C., pt. I):

§ 34 (destruction of aircraft or motor vehicle carrier facilities, resulting in death)
§ 794 (gathering or delivering defense information to aid a foreign government)
§ 844(d), (f), (i) (84 Stat. 957-958) (certain explosives offenses resulting in death)
§ 1111 (murder)
§ 1114 (murder of officers and employees of the United States)
§ 1201 (kidnapping if victim is not released unharmed)
§ 1716 (mailing injurious article, causing death)
§ 1751 (presidential and vice-presidential assassination)
§ 1992 (wrecking train, resulting in death)
§ 2031 (rape)

*Some of these provisions are unconstitutional and inoperative under *United States v. Jackson*, 390 U.S. 570 (1968).

§2113(e) (bank robbery accompanied by death or kidnapping)
§2381 (treason)

Federal Aviation Program (49 U.S.C., ch. 20):

§1472(i), (k)(1) (aircraft piracy, including attempts; rape or murder aboard aircraft)

District of Columbia

D.C. Code (1967):

§22-2401 (murder)

Alabama

Code of Ala., (Recomp. Vol. 1958):

§14-7 (kidnapping for ransom)
§14-8 (attempted kidnapping for ransom)
§14-23 (first degree arson with loss of life or maiming)
§14-24 (second degree arson with loss of life or maiming)
§14-39 (assault on prison guard or any murder by life term prisoner)
§14-85 (burglary)
§14-97(5) (sabotage)
§14-123 (dynamiting under or near inhabited area)
§14-315 (killing in duel)
§14-316 (killing with concealed weapon)
§§14-318,-319 (murder)
§14-355 (lynching)
§14-395 (rape)
§§14-397,-398 (carnal knowledge)
§14-415 (robbery)
§14-416 (train robbery)
§14-424 (treason)

Arizona

Ariz. Rev. Stat. (1956):

§13-250 (armed assault by life term prisoner)
§13-453 (murder)
§13-492 (kidnapping for ransom if victim is harmed)
§13-572 (perjury in capital case resulting in death of innocent person)
§13-644 (train robbery)
§13-701 (treason)

Arkansas

Ark. Stat. Ann. (1947):

§41-502 (arson of prison by convict)
§41-2211 (aiding suicide)
§41-2212 (deadly arson)
§41-2213 (killing in duel)
§41-2214 (captain of boat causing death by deliberately ramming into craft)
§41-2215 (unnecessary killing while resisting felony)
§41-2216 (police officer causing death by exceeding bounds of moderation)
§41-2227 (murder)
§41-2304 (kidnapping for ransom or if victim is harmed)
§41-3403 (rape)
§41-3405 (carnal knowledge of woman intentionally drugged)
§41-3411 (forcing woman to marry)
§41-4102 (treason)

California

Cal. Penal Code (West, 1954):

§37 (treason)
§128 (perjury in capital case resulting in death of innocent person)
§190 (murder)
§209 (kidnapping for ransom or robbery if victim is harmed)

§219 (train wrecking)
§4500 (assault with a deadly weapon or means likely to cause great bodily injury, by a prisoner under sentence of life imprisonment)
§12310 (explosive device causing great bodily injury)

Cal. Mil. & Vet. Code (West, 1955):

§1670, 1672(a) (sabotage causing death or great bodily injury)

Colorado

Colo. Rev. Stat. (1963):

§40-2-3 (murder)
§40-2-45 (kidnapping if victim suffers bodily ha
§40-2-51 (causing death of woman by abortion)
§40-2-52 (causing death of woman during pre tended abortion)
§40-7-3 (perjury in capital case resulting in de of innocent person)
§40-7-49 (armed assault by escaped life prisoner
§40-23-14 (causing death during commission of criminal anarchy)

Connecticut

Conn. Gen. Stat. Ann. (1967):

§53-10 (murder; causing death by arson, bombin or train wrecking)

Delaware

Del. Code Ann. (1970 Cum. pocket part):

tit. 11, §§107, 571 (murder)

Florida

Fla. Stat. Ann. (1965):

§779.07 (sabotage)
§782.04 (murder)
§782.05 (killing in duel)
§782.06 (causing death by train wrecking)
§790.16 (throwing bombs or firing machine-gun in public)
§790.161 (throwing bombs damaging property where death results)
§794.01 (rape; carnal knowledge if victim is under ten)
§805.02 (kidnapping for ransom)

Georgia

Ga. Crim. Code (1969):

§26-1101(c) (murder)
§26-1311 (kidnapping for ransom)
§26-1902 (armed robbery)
§26-2001 (rape)
§26-2201 (treason)
§26-2401 (perjury in a capital case resulting in death)
§26-9921(a) (fetacide)
§26-9922(a) (advising fetacide to a woman)

Idaho

Ida. Code (1947):

§18-4004 (murder)
§18-4504 (kidnapping for ransom if victim is harmed)
§18-5411 (perjury in capital case resulting in death of innocent person)
§18-6007 (causing death by train wrecking)

Illinois

Ill. Ann. Stat. (1961):

c. 38, §9-1 (murder)
c. 38, §10-2 (kidnapping for ransom)
c. 38, §30-1 (treason)

Indiana

Burns Ind. Stat. Ann. (1956):

§10-307 (arson causing death)
§10-3306 (mob lynching causing death)
§10-3401 (murder)
§10-3402 (killing in duel)
§10-3902 (causing death by train wrecking)
§10-4401 (treason)
§10-2903 (kidnapping for ransom)

Kansas

Kan. Stat. Ann. (1970 Cum. Supp.):

§21-3401 (murder)
§21-3421 (kidnapping if victim is harmed)
§21-3801 (treason)
§21-4501(a) (prescribing death penalty for the foregoing crimes)

Kentucky

Ky. Rev. Stat. Ann. (1963):

§433.140 (armed robbery)
§433.150 (asault to rob or with intent to rob)
§433.390 (causing death by train wrecking)
§435.010 (murder)
§435.030 (killing during advocacy of criminal syndicalism)
§435.040 (causing death of woman by abortion)
§435.060 (causing death by obstructing road)
§435.070 (lynching)
§§435.080,-090 (rape)

Massachusetts

Ann. Laws Mass. (1968):
ch. 265, § 2 (murder)

§435.140 (kidnapping for ransom)
§435.190 (reckless shooting into train or motor vehicle)

Louisiana

La. Stat. Ann. (West, 1950):

§14:30 (murder)
§14:42 (aggravated rape)
§14:44 (aggravated kidnapping)
§14:113 (treason)

Maryland

Ann. Code Md. (1957):

§27-12 (assault with intent to rape)
§27-337 (kidnapping)
§27-408 (killing in perpetration of arson)
§27-409 (killing committed in burning of barn, tobacco house, stable or warehouse)
§27-410 (killing while attempting to escape prison or commit rape, sodomy, mayhem or robbery)
§27-413 (murder)
§27-454 (causing death by train wrecking)
§27-461 (rape)
§27-462 (carnal knowledge of child under fourteen)

Mississippi

Miss. Code Ann. (Recomp. vol. 1956):

§2096 (killing in duel)
§2143 (bombing in or near inhabited area)
§2217 (murder)
§2223 (causing death of woman by abortion)
§2238 (kidnapping)
§2358 (rape, including attempts)
§2367 (armed robbery)
§2397 (treason)

Missouri

Vernon's Mo. Stat. Ann. (1953):

§557.020 (perjury in capital case resulting in death of accused)
§559.030 (murder)
§559.230 (kidnapping for ransom)
§559.260 (rape)
§560.135 (armed robbery)
§562.010 (treason)
§564.560 (bombing)

Montana

Rev. Code Mont. (1947):

§94-2505 (murder)
§94-2601 (kidnapping for ransom)
§94-3207 (causing death by train wrecking)
§94-3813 (perjury in capital case resulting in death of innocent person)
§94-4501 (treason)

Nebraska

Neb. Rev. Stat. (1943):

§28-401 (murder)
§28-417 (kidnapping if victim is injured or threatened with injury)

Nevada

Nev. Rev. Stat (1967):

§196.010 (treason)
§199.160 (perjury resulting in death of innocent person)
§200.030 (murder)
§200.363 (rape with substantial bodily harm)
§200.320 (kidnapping for ransom if victim is harmed)
§200.400 (assault with intent to rape accompanied by acts of violence and bodily harm)

§200.410 (killing in duel)
§202.270 (dynamiting where threat to human life)
§212.060 (life prisoner killing any person while attempting to escape)

New Hampshire

N.H. Rev. Stat. Ann. (1955):

§585.4 (murder)

New Jersey

N.J. Stat. Ann. (1952):

§2A: 113-4 (murder)
§2A: 118-1 (kidnapping for ransom)
§2A: 148-1 (treason)
§2A: 148-6 (attempt or conspiracy to assault chief of state)

New Mexico

N.M. Stat. Ann. (1969 Cum. pocket part):

§40A-29-2.1 (murder of police officer or prison guard, or commission of second capital felony after time for due deliberation after the first)

New York

N.Y. Penal Code (McKinney's, 1967):

§125.30 (murder of police officer or by life term prisoner)

North Carolina

N.C. Gen. Stat. (1953):

§14-17 (murder)
§14-20 (killing in duel)

§14-21 (rape)
§14-52 (burglary)
§14-58 (arson)

North Dakota

N.D. Century Code (1960):

§12-07-01 (treason)
§12-27-13 (first degree murder by prisoner serving life sentence for first degree murder)

Ohio

Ohio Rev. Code Ann. (1953):

§2901.01 (murder)
§2901.02 (causing death by train wrecking)
§2901.03 (convict killing guard)
§2901.04 (killing police officer on duty)
§2901.09 (killing President or presidential successor)
§2901.10 (killing Governor or Lieutenant-Governor)
§2901.27 (kidnapping or maiming for extortion, if victim is not released unharmed)
§2901.28 (killing a kidnapped person by designated means)

Oklahoma

Okla. Stat. Ann. (1958):

tit. 21, §707 (murder)
§745 (kidnapping for ransom)
§801 (armed robbery)
§1115 (rape)

Pennsylvania

Purdon's Pa. Stat. Ann. (1962):

tit. 18, §4701 (murder)
§4710.2 (assault with intent to kill by life term prisoner)
§3765 (lynching)
§4919 (causing death by train wrecking)

Rhode Island

R.I. Gen. Laws (1970):

§11-23-2 (murder by life-sentenced prisoner)

South Carolina

S.C. Code Ann. (1962):

§16-52 (murder)
§16-54 (killing by stabbing)
§16-57 (lynching)
§16-63 (killing in duel)
§§16-72,-80 (rape; assault with attempt to rape; carnal knowledge)
§16-91 (kidnapping where victim is not released alive before trial)
§16-92 (conspiracy to kidnap)
§17-553.1 (third conviction for crimes optionally punishable by death)
§§44-353,-354 (giving information or aiding enemy in time of war)

South Dakota

S.D. Comp. Laws (1967):

§22-16-12 (murder)
§22-19-1 (kidnapping if victim is harmed)

Tennessee

Tenn. Code Ann. (1955):

§39-2405 (murder)
§39-2603 (kidnapping for ransom)
§39-2803 (assault with deadly weapon while in disguise)
§39-3702 (rape)
§§39-3703 through 39-3705 (carnal knowledge)
§39-3901 (armed robbery)

Texas

Vernon's Tex. Penal Code Ann. (1961):

§33 (instigation of a minor by a relative or spouse to commit a capital crime)
§84 (treason)
§309 (perjury in capital case resulting in an execution)
§1177(a) (kidnapping for ransom)
§1183 (carnal knowledge)
§1189 (rape)
§1257 (murder)
§1260(a) (lynching)
§1408 (armed robbery)

Utah

Utah Code Ann. (1953):

§76-7-12 (armed assault by life term prisoner)
§76-16-2 (killing in duel)
§76-30-4 (murder)
§76-35-1 (kidnapping for ransom)

Vermont

Vt. Stat. Ann. (1970 Cum. supp.):

tit. 13, §2303 (second first degree murder offense; murder of prison guard or police officer)

Virginia

Va. Ann. Code (Repl. vol. 1960):

§18.1-16 (attempt to commit rape)
§18.1-22 (murder)
§18.1-38 (kidnapping for ransom or immoral purposes)
§18.1-44 (rape and carnal knowledge)
§18.1-75 (arson)
§18.1-86 (burglary)
§18.1-90 (armed bank robbery)
§18.1-91 (aggravated robbery)
§18.1-259 (machine gun used in perpetration of crime of violence)
§18.1-418 (treason)

Washington

Wash. Rev. Code Ann. (1961):

§9.48.030 (causing death by train wrecking)
§9.48.030 (murder)
§9.52.010 (kidnapping for ransom)
§9.82.010 (treason)

Wyoming

Wyo. Stat. Ann. (1957):

§6-54 (murder)
§6-56 (killing in duel)
§6-59 (kidnapping for ransom or robbery if victim is harmed)
§6-61 (child stealing)
§37-248 (causing death by train wrecking or boarding train with intent to commit a felony)

APPENDIX H

THE EVIDENCE CONCERNING THE DETERRENT EFFICACY OF THE DEATH PENALTY

This appendix describes the findings of the numerous udies conducted during recent decades concerning the terrent efficacy of capital punishment. Part A sets forth e conclusions of social scientists who have tested statisally the hypothesis that capital punishment is superior to prisonment as a deterrent of the crime of murder. Part evaluates the anecdotal impressions of law enforcement ficers on the same subject.

A. The Statistical Evidence

It is no exaggeration to report that scientific studies of e deterrent effect of capital punishment speak with rare d compelling unanimity. Recent studies are presaged by e conclusions of George B. Vold in 1932 that "the death nalty does not, and can not, prevent crime, either specifily in regard to murder or more generally in regard to ner kinds of crime,"[1h] and of Robert H. Dann in 1935 at "the homicide rate can never be materially affected, e way or the other, by the present program of executns . . . ."[2h]

A number of post-War studies were based on the data llected during the intensive efforts of the British Royal mmission on Capital Punishment, between 1949 and 53.[3h] That data led all informed students of the subject conclude: "[I]t is not true to say that capital punish-

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[1h]Vold, *Can the Death Penalty Prevent Crime?*, 12 PRISON URNAL (No. 4) 4, 9 (1932).

[2h]Dann, *The Deterrent Effect of Capital Punishment*, FRIENDS IAL SERVICE SERIES, Bulletin No. 29 (Third Month) 19 (1935).

[3h]See ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-, REPORT (H.M.S.O. 1953) Cmd. 8932 [hereafter cited as YAL COMMISSION].

ment is in practice a greater deterrent than other forms of severe punishment."[4h] The conclusion of the Commission itself, confined as it was by its limited terms of reference, was: "It is . . . important . . . not to base a penal policy in relation to murder on exaggerated estimates of the uniquely deterrent force of the death penalty."[5h] And the Commission carefully noted that "it is impossible to arrive confidently at any firm conclusion about the deterrent effect of the death penalty, or indeed of any form of punishment."[6h] But this caution and its technically delimited conclusion does not obscure the Commission's assessment of the statistical evidence before it:

> ". . . We agree with Professor Sellin that the only conclusion which can be drawn from the figures is that there is no clear evidence of any influence of the death penalty on the homicide rates of these States [principally neighboring abolitionist and retentionist jurisdictions of the United States, systematically studied by Sellin] and that, 'whether the death penalty is used or not and whether executions are frequent or not, both death-penalty States and abolition States show rates which suggest that these rates are conditioned by other factors than the death penalty.'"
>
> ". . . The general conclusion which we have reached is that there is no clear evidence in any of the figures we have examined that the abolition of capital punishment has led to an increase in the homicide rate, or that its reintroduction has led to a fall."[7h]

[4h] GARDINER, CAPITAL PUNISHMENT AS A DETERRENT: AND THE ALTERNATIVE (1956), 31. *Accord:* GOWERS, A LIFE FOR A LIFE (1956), 138; Hart, *Murder and the Principles of Punishment: England and the United States,* 52 NW. U. L. REV. 433, 458 (1957). See also KOESTLER, REFLECTIONS ON HANGING (Amer. ed. 1957), 59.

[5h] ROYAL COMMISSION 24.

[6h] *Ibid.*

[7h] *Id.*, at 23.

The conclusion of the more recent study made under the auspices of the European Committee on Crime Problems of the Council of Europe is in full accord with the Royal Commission's findings. "Even a cursory examination of the statistics on the subject for [Council of Europe] countries shows that they give no positive indication regarding the value of capital punishment as a deterrent."[8h]

Contemporary criminologists who have studied deterrence and the death penalty in the United States speak with one voice in summarizing their conclusions from the evidence:

> Capital punishment has had no appreciable influence on the murder rate in the states which have been investigated.[9h]
>
> Capital punishment does not act as an effective deterrent to murder.[10h]
>
> Capital punishment is ineffective in deterring murder.[11h]
>
> The use or non-use of capital punishment has no effect on the number of murders committed within a state or the nation.[12h]
>
> The evidence indicates that [the death penalty for murder] has no discernible effects in the United States.[13h]

[8h] ANCEL, THE DEATH PENALTY IN EUROPEAN COUNTRIES (Council of Europe, European Committee on Crime Problems, 1962), 45-46.

[9h] Andenaes, *Does Punishment Deter Crime?* 11 CRIMINAL LAW QUARTERLY 76, 83 (1968).

[10h] Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions,* [1967] WISCONSIN L. REV. 703, 706 (1967).

[11h] Doleschal, *The Deterrent Effect of Legal Punishment: A Review of Literature,* 1 INFORMATION REVIEW ON CRIME & DELINQUENCY (No. 7) 7 (1969).

[12h] LUNDEN, THE DEATH PENALTY (1960), § 22.

[13h] Reckless, *The Use of the Death Penalty–A Factual Statement,* 15 CRIME & DELINQUENCY 43, 52 (1969).

> Statistical findings and case studies converge to disprove the claim that the death penalty has any special deterrent value.[14h]
>
> The death penalty, as we use it, exercises no influence on the extent or fluctuating rates of capital crimes.[15h]
>
> The studies [of capital punishment] suggest no discernible relationship between the presence of the death penalty and homicide rates.[16h]
>
> The capital punishment controversy has produced the most reliable information on the general deterrent effect of a criminal sanction. It now seems established and accepted that . . . the death penalty makes no difference to the homicide rate.[17h]

These general conclusions rest upon the following results of statistical inquiries into specific aspects of the deterrence question:

> Death penalty jurisdictions do not have a lower rate of criminal homicide than abolition jurisdictions.[18h]
>
> Given two states otherwise similar in factors that might affect homicide rates, and differing in that one employs capital punishment while the other

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[14h] Schuessler, *The Deterrent Influence of the Death Penalty*, 284 ANNALS 54, 62 (1952).

[15h] SELLIN, THE DEATH PENALTY (1959), published as an appendix to AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Tent. Draft No. 9 (May 8, 1959) [hereafter cited as SELLIN (1959)], 63.

[16h] ZIMRING, PERSPECTIVES ON DETERRENCE (Nat'l Institute of Mental Health, January 1971), 17.

[17h] Morris and Zimring, *Deterrence and Corrections*, 381 ANNALS 137, 143 (1969).

[18h] Schuessler, *supra* note 14h, at 57; Reckless, *supra* note 13h at Table 9.

does not, the abolition state does not show any consistently higher rate of criminal homicide.[19h]

In jurisdictions which abolish the death penalty, abolition has no influence on the rate of criminal homicide.[20h]

Jurisdictions which reintroduce the death penalty after having abolished it do not show a decreased rate of criminal homicide after reintroduction.[21h]

Police officers on duty do not suffer a higher rate of criminal assault and homicide in abolition jurisdictions than in death penalty jurisdictions.[22h]

Prisoners and prison personnel do not suffer a higher rate of criminal assault and homicide from life-term prisoners in abolition jurisdictions than in death penalty jurisdictions.[23h]

[19h] SELLIN (1959) 23-34; SELLIN, CAPITAL PUNISHMENT (1967) [hereafter cited as SELLIN (1967)], 135-138.

[20h] SELLIN (1959) 34-38; SELLIN (1967) 122-124; Samuelson, *Why Was Capital Punishment Restored in Delaware*, 60 J. CRIM. L., CRIM. & POL. SCI. 148, 150-151 (1969).

[21h] SELLIN (1959) 34-38; SELLIN (1967) 122-124; Samuelson, note 20h *supra*, at 150-151.

[22h] Sellin, *Does the Death Penalty Protect Municipal Police*, in BEDAU, THE DEATH PENALTY IN AMERICA (Rev. ed. 1967) [hereafter cited as BEDAU], 284-301; Campion, *Does the Death Penalty Protect the State Police*, in BEDAU 301-315.

[23h] MASSACHUSETTS SPECIAL COMMISSION ESTABLISHED FOR THE PURPOSE OF INVESTIGATING AND STUDYING THE ABOLITION OF THE DEATH PENALTY IN CAPITAL CASES, REPORT AND RECOMMENDATIONS, 21-22 (1958); SELLIN (1967) 154-160; Sellin, *Homicides and Assaults in American Prisons*, 1964, 31 ACTA CRIMINOLOGIAE ET MEDICINAE LEGALIS JAPONICA 139 (1965).

B. Impressions of Law Enforcement Officers

Law enforcement officers frequently dismiss the statistical evidence set forth above because they say that it fails to prove that the threat of capital punishment never deterred a murder which would have occurred if imprisonment had been the only risk run by the murderer.[24h] Police spokesmen invariably base their own belief in the deterrent efficacy of the death penalty entirely upon impressionistic bases,[25h] and upon the quoted statements of criminals (made to police officers following their arrests) claiming that they carried toy guns in robberies out of fear of the death penalty.[26h] It would be improper, certainly, to reject the intuitions of the police out of hand, or to assert categorically that the fear of death never has dissuaded any putative murderer from his crime. However, several circumstances render these police opinions gravely suspect as a foundation for the present-day American use of death as a penalty for first-degree murder.

First, correctional officials, whose knowledge of criminal offenders is at least as informed as that of the police, generally do not believe that the death penalty is a superior deterrent to imprisonment.[27h] They and other knowledgeable observers agree that a very large proportion of the crimes which are defined by law as first-degree murders and

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[24h] E.g., Hoover, *Statements in Favor of the Death Penalty*, in BEDAU 130; Allen, *Capital Punishment: Your Protection and Mine*, in BEDAU 135.

[25h] See ROYAL COMMISSION 18-24; CANADA, JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON CAPITAL AND CORPORAL PUNISHMENT AND LOTTERIES, REPORT (1956), paras. 29-33, 43-50; NEW JERSEY, COMMISSION TO STUDY CAPITAL PUNISHMENT, REPORT (1964) 8-9.

[26h] E.g., Desky, *Should Capital Punishment be Abolished in California*, 39 THE COMMONWEALTH 19, 23 (November 11, 1963).

[27h] See note 116, para. (4) to the body of this brief.

made punishable by death are not the product of rational choice which the threat of the extreme penalty can deter.[28h] Second, when a murder *is* the product of rational choice in the sense that it can be affected by the threat of punishment, the threat of death punishment is so attenuated by its uncertainty as to become minimally significant.[29h] Third, the number of "toy gun" incidents and similar cases in which criminals assert that their behavior was affected by the threat of the death penalty remains uncounted, but (even if the reports are reliable)[30h] these cases must be few, since they register no impact upon any known comparison of homicide rates in abolition and death-penalty jurisdictions or eras. See Part A, *supra*. Of course, it may be that such cases are offset by the equally unknown number of instances of the clinically documented converse phenomenon of "suicide-by-homicide": that is, the cases of killers who kill in order to force society to kill

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[28h] LAWES, LIFE AND DEATH IN SING SING (1928), 144-145; Testimony of Clinton T. Duffy, in *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 2d Sess., on S.1760, To Abolish the Death Penalty (March 20-21 and July 2, 1968) (G.P.O. 1970) [hereafter cited as *Hearings*], 23; DUFFY & HIRSHBERG, 88 MEN AND TWO WOMEN (1962); 256, see WEIHOFEN, THE URGE TO PUNISH (1956); 150-152; PLAYFAIR & SINGTON, THE OFFENDERS (1957), 228; Statement of Attorney General Ramsey Clark, in *Hearings*, at 92; Ancel, *The Problem of the Death Penalty*, in SELLIN (1967), 3, 17, Sellin, *The Inevitable End of Capital Punishment*, in SELLIN (1967), 239, 249-250; McNamara, *Statement Against Capital Punishment*, in BEDAU 182, 185-186; Schuessler, *The Deterrent Influence of the Death Penalty*, 284 ANNALS 54, 61-62 (1952); Caldwell, *Why Is The Death Penalty Retained?* 284 ANNALS 45, 51 (1952)

[29h] See WEIHOFEN, THE URGE TO PUNISH (1956), 159-164; BEDAU 270.

[30h] They seem unlikely to be very reliable, since an arrested man will understandably tell a policeman what he thinks the policeman wants to hear. See Testimony of Clinton T. Duffy, in *Hearings*, at 23.

them in return.[31h] In any event, one thing seems plain. The police impressions and anecdotes do not point to any factor, unaccounted for by the statistical studies, which would explain why the studies consistently fail to reflect appreciable deterrent effects of the death penalty if they exist.

[31h] West, *Medicine and Capital Punishment*, in *Hearings*, at 124, 126-127; SELLIN (1959) 65-69; BEDAU 264 n.7; Gold, *Suicide, Homicide, and the Socialization of Aggression*, 63 AM. J. SOCIOLOGY 651 (1958); Neiberg, *Murder and Suicide*, 4 ARCH. CRIM. PSYCHODYNAMICS 253 (1961); OHIO LEGISLATIVE SERVICE COMMISSION, STAFF RESEARCH REPORT No. 46, CAPITAL PUNISHMENT (1961), 49.

APPENDIX I

DESCRIPTION OF AMERICAN METHODS OF EXECUTION

Lethal Gas

720. The lethal chamber is very elaborate in comparison with the apparatus needed for other methods of execution. It is expensive to install and requires a complicated series of operations to produce the gas and to dispose of it afterwards. The technique appears to be substantially the same in all the States that employ the gas chamber, although the complexity of the apparatus varies from State to State. The following description of the method and equipment employed in North Carolina[1] is typical.

"A chamber or room, when the doors are closed, is hermetically sealed to prevent leakage of cyanide gas. This room contains two observation windows. One window is for observation by the required witnesses and the other for officials required to be present at the execution. The doors leading to the chamber are connected with the electrically controlled panel. This is the safety measure, and unless the doors are properly closed the trap, allowing the cyanide pellets to drop into the acid, cannot be thrown. In this room is a wooden chair with leather straps for strapping the prisoner's arms, legs and across the abdomen to the chair. In the seat of this chair is a trap door electrically controlled which releases the cyanide pellets.

"Prior to the execution all equipment is double checked and a pound of sodium cyanide pellets is placed in the trap in the seat of the chair. Twenty minutes before execution three pints of U.S.P. sulphuric acid and six pints of water are carefully mixed in a lead container. The container is covered with a lid of similar material and is placed under the chair in a position to receive the pellets when dropped.

"There are two copper pipes adjacent to the chair which lead under the floor outside the physician's stand. At the end of the pipe in the chamber is a rubber hose which is to be connected to the head of a Bowles stethoscope strapped to the prisoner's chest. Attached to the other end of the copper pipes at the physician's stand are the earpieces of a stethoscope for determining the time of the prisoner's death.

"The prisoner has been previously prepared in his cell in this manner; clothing removed, with the exception of shorts; the head of a Bowles stethoscope strapped over the apex of the heart with broad strips of adhesive.

"After the above preparations the prisoner walks to the execution chamber preceded by the Chaplain and followed by the Warden or one of his Deputies. He is then strapped in the chair under the supervision of the Warden or Deputy; a leather mask applied to the face; the stethoscope head connected with aforementioned tube; the Chaplain's prayers completed and

all officials leave the chamber. The last person leaving the chamber quickly removes the cover from the acid container. The doors to the chamber and ante-room are quickly closed and the pellets dropped in the acid by the electrically controlled switch.

"After the prisoner is pronounced dead by the attending physician ammonia gas is forced into the chamber until indicators within the chamber show that all cyanide gas has been neutralised. Ammonia gas is then removed by a specially constructed exhaust fan."

721. The length of time taken by this method of execution is illustrated by the following timetable of an execution in Nevada:[3]

Guards enter prisoner's cell	5.56 a.m.
Prisoner enters gas chamber	5.58
Strapped in chair	5.59: 30
Door closed	6.01: 30
Gas strikes face	6.02: 30
Apparently unconscious	6.02: 35
Certainly unconscious	6.03
Respiration stopped	6.03
Heart stopped beating	6.04
Suction fan started	6.10
Body removed	6.40

722. When this method was first employed, medical opinion was not unanimous about it; there were some who thought that the gas had a suffocating effect which would cause acute distress, if not actual pain, before the prisoner became unconscious. It seems to be now generally agreed that unconsciousness ensues very rapidly.

ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT (H.M.S.O. 1953) [Cmd. 8932] [hereafter cited as ROYAL COMMISSION], 252-253.

On the morning of an execution the executioner got two pounds of cyanide from the prison armory and took it to a mix room off the gas chamber. Regardless of whether there was to be one execution or two, he carefully measured out into little gauze bags one pound of cyanide for each chair. These bags were placed on hooks directly under the chairs, hanging down toward the wells a few inches below.

About ten minutes before the prisoner was to be brought in, the executioner put a gallon of distilled water into each of two jars, then added sulphuric acid, letting it stand in the mix room until it was time for the actual execution. Tubes ran from these jars into the wells beneath the chairs. After the chamber was tested for leaks, the prisoner, with a stethoscope strapped to his chest, was taken from the holding cell. When he was seated in one of the chairs, his hands and feet were strapped and the stethoscope was hitched to a tube connected with a valve outside the chamber, where the attending physician could listen to the man's heart beats and report the time of death.

When the door was sealed with the prisoner inside, the executioner pulled a lever controlling a suction fan that drew some of the air out of the chamber. He then signaled an assistant in the mix room, who opened the valves releasing the sulphuric acid from the jars into the wells beneath the chairs. After the valves were closed, the executioner informed the warden, standing beside him outside a window to the left of the condemned man, that everything was in readiness. At the warden's nod, the executioner pulled another lever which lowered the cyanide into the sulphuric acid, causing gas fumes to rise. The whole operation took less than two minutes.

In order to make death as quick and painless as possible, the condemned man was instructed to take deep breaths at the warden's signal. This would be a few seconds after the cyanide and sulphuric acid came together. Without the inhalations, loss of consciousness would take longer and choking might result.

DUFFY & HIRSHBERG, 88 MEN & 2 WOMEN (1962), 102-103.

In administering death by lethal gas, which has been most
experience, and hanging, from 89 personal experiences, I ma
following observations:

With the exception of the death watch (which is used in all met
there are no last hours of preparation of the body of the conde
The prisoner is kept in a holding cell in a separate room for hi
few days—usually not more than 20 feet from the lethal gas cha
He does not see the gas chamber until he enters it. A few mo
before the scheduled hour a chaplain of his choice visits with hi
is dressed in blue jeans and a white shirt. The reason for that
other garments that might hold or pocket gas when the body
moved. He is accompanied the 10 or 12 steps by two officers, q
strapped in the metal chair, the stethoscope applied, and the
sealed. The warden gives the executioner the signal and, out of
of the witnesses, the executioner presses the lever that allow
cyanide gas eggs to mix with the distilled water and sulphuric
In a matter of seconds the prisoner is unconscious. At first there
treme evidence of horror, pain, strangling. The eyes pop, they
purple, they drool. It is a horrible sight. Witnesses faint. It
is as though he has gone to sleep. The body, however, is not disf
or mutilated in any way.

TESTIMONY OF CLINTON T. DUFFY, in *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 2d Sess., on S. 1760, To Abolish the Death Penalty (March 20-21 and July 2, 1968) (G.P.O. 1970) [hereafter cited as *Hearings*], 21.

The next morning, a Friday, I went into the Holdi
Cell area about eight-thirty. The guard said Leanderess h
slept for only fifteen minutes, around six o'clock. I offer
to read from the Bible; he appeared to listen. I read fro
the Psalms, and parts of two hymns: "Rock of Ages" a
"Abide with Me." Leanderess held up his hands, palms o
in a gesture for me to stop. He had not paid any noticeab

attention at any time, had continued pacing around his tiny cell.

He still had about an hour to live. I sat down outside his cell door. The guards talked about retirement, and whether the golf course would be too wet the next morning. At nine-fifty, Associate Warden Rigg and the doctors came in. I told Leanderess to say a prayer to himself, if he did not care to have me pray, and to relax into God's care. He did not seem to hear me. When the doctors started to approach his cell, he made a throaty, gutteral growling sound. Frantically, at random, he picked up some of the old legal papers on his table and began passing them through the bars to the associate warden, as if they were appeals or writs.

A guard unlocked his cell. He gripped the bars with both hands and began a long, shrieking cry. It was a bone chilling wordless cry. The guards grabbed him, wrested him violently away from the bars. The old shirt and trousers were stripped off. His flailing arms and legs were forced into the new white shirt and fresh blue denims. The guards needed all their strength to hold him while the doctor taped the end of the stethoscope in place.

The deep-throated cry, alternately moaning and shrieking, continued. Leanderess had to be carried to the gas chamber, fighting, writhing all the way. As the witnesses watched in horror, the guards stuffed him into a chair. One guard threw his weight against the struggling little Negro while the other jerked the straps tight. They backed out, slammed the door on him.

Leanderess didn't stop screaming or struggling. Associate Warden Rigg was about to signal for the dropping of the gas pellets when we all saw Riley's small hands break free from the straps. He pulled at the other buckles, was about to free himself.

The Associate Warden withheld his signal. San Quentin had never executed a man ranging wildly around the gas chamber. He ordered the guards to go in again and restrap

the frenzied man. One of the guards said later he had to cinch the straps down so tightly the second time that he "was ashamed of himself."

Again the door was closed. Again Leanderess managed to free his small, thin-wristed right hand from the straps. Riggs gave the order to drop the pellets. Working furiously, Leanderess freed his left hand. The chest strap came off next. Still shrieking and moaning, he was working on the waist strap when the gas hit him. He put both hands over his face to hold it away. Then his hands fell, his head arched back. His eyes remained open. His heart beat continued to register for two minutes, but his shrieking stopped and his head slowly drooped.

ESHELMAN, DEATH ROW CHAPLAIN (1962), 160-161.

Electrocution

717. During our visit to America we inspected the electric chairs at Sing Sing Prison, New York, and the District of Columbia Jail, Washington, and we received evidence about the use of the chair in other States. The following account of this method of execution is based primarily on the information obtained in Washington, where the procedure is as follows.

The execution takes place at 10 a.m. At midnight on the preceding night the condemned man is taken from the condemned cell block to a cell adjoining the electrocution chamber. About 5.30 a.m. the top of his head and the calf of one leg are shaved to afford direct contact with the electrodes. (The prisoner is usually handcuffed during this operation to prevent him from seizing the razor.) At 7.15 a.m. the death warrant is read to him and about 10 o'clock he is taken to the electrocution chamber. Five witnesses are present (including representatives of the Press) and two doctors—the prison medical officer and the city coroner. The witnesses watch the execution through a grille or dark glass and cannot be seen by the prisoner.[9] Three officers strap the condemned man to the chair, tying him around the waist, legs and wrists. A mask is placed over his face and the electrodes are attached to his head and legs. As soon as the operation is completed (about two minutes after he has left the cell) the signal is given and the switch is pulled by the electrician; the current is left on for two minutes, during which there is alternation of two or more different voltages. When it is switched off, the body slumps forward in the chair. The prisoner does not make any sound when the current is

l on, and unconsciousness is apparently instantaneous. He is not, er, pronounced dead for some minutes after the current is disconnected. eg is sometimes slightly burned, but the body is not otherwise marked utilated. So far as is known no special difficulties arise in the ion of women: there had been no case in Washington.

. In Washington the electric chair is a permanent fixture in a special- er. In some States movable chairs are used which can be installed by mpetent electrician. No case of mishap was recorded in Washington, seems that in some other States there have been occasions when rrent failed to reach the chair when the switch was engaged. Some install an emergency generator in order that an execution may not layed by a failure of the commercial power.

ROYAL COMMISSION 251.

The technique now used in execution by electricity has been gradually evolved by leading electrical and medical experts working in collaboration with the prison authorities. It has been found by exhaustive research that a current of one ampere passing through the brain or other vital organ of the body will in most cases produce death if allowed to act for only a short period of time, and it is therefore evident that it is the amperage (or quantity of electrical current flowing in the circuit) together with the energy dissipated in the body which actually destroys life. On the other hand, the element of voltage enters, insomuch as the resisting power of the human body is very high and it requires a voltage comparatively large or small, depending entirely upon the resistance and contacts, to force this amount of current through a circuit in which the body, with its contacts, constitutes the resistance.

The condemned prisoner undergoing electrocution at Sing Sing Prison is given one shock of single phase 60

cycle alternating current at an average starting potential of approximately 2,000 volts. This voltage is immediately reduced at the end of three seconds to the neighbourhood of 500 volts where it is held for an additional period of 57 seconds and is again built up instantly to the original starting voltage of 2,000. The current is then gradually reduced again to 500 volts, where it is held for another 57 seconds and is again rapidly built up to the original voltage of 2,000 just before the switch is finally opened by the executioner after a total application period of two minutes.

This initial electromotive force, with the moistened contacts used, sends a starting current of from 8 to 10 amperes through the human body, which causes instantaneous death and unconsciousness by its paralysis and destruction to the brain. The current is then cut down under the lower voltages to from 3 to 4 amperes in order to avoid burning the body and at the same time to hold paralysis of the heart, respiratory organs, and brain at a standstill for the remaining period of execution. This insures complete destruction of all life.

If temperatures are taken during and immediately after an application of electricity it will be found that the electrodes making contact may reach a temperature high enough to melt copper (1,940 degrees Fahrenheit) and that the average body temperature will be in the neighbourhood of 140 degrees Fahrenheit, which, if this temperature rise alone were considered, would show that it is impossible to restore life or reinstigate blood circulation under such abnormally high bodily temperatures.

It will also be found that under such an application of electricity the temperature in the brain itself approaches the boiling point of water, namely 212 degrees Fahrenheit.

The force of the death-dealing blow the condemned prisoner receives is more easily understood when it is realized that this amount of electricity, transferred into mechanical power, would be equivalent to 884,400 foot-pounds per minute, or enough electrical energy to light 800 lights in the average home.

Under correct application approximately one third of the total electrical energy shot into the human body is dissipated in the brain, and scientific analysis proves that unconsciousness takes place in less than a 240th part of a second, which is far more rapid than the speed with which the nervous system of the human body can record the sensation of pain. This insures a death that is both instantaneous and painless.

LAWES, LIFE AND DEATH IN SING SING (1928), 187-189.

Although I have seen several electric chairs, I have never witssed an electrocution. Wardens and other noted penologists have ld me that it is about as gruesome a procedure as hanging. The body s to be prepared beforehand for the fastening, and one of the pants gs split in order that an electric plate can be placed against the leg. hen the executioner throws the switch that sends the electric curnt through the body, the prisoner cringes from torture, his flesh swells d his skin stretches to a point of breaking. He defecates, he urinates, s tongue swells and his eyes pop out. In some cases I have been d the eyeballs rest on the cheeks of the condemned. His flesh is rned and smells of cooked meat. When the autopsy is performed the er is so hot that doctors have said that it cannot be touched by the man hand.

stimony of Clinton T. Duffy, in *Hearings*, at 20.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

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STATE OF CALIFORNIA, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 69-5030

LUCIOUS JACKSON, *Petitioner,*

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WILLIAM HENRY FURMAN, *Petitioner,*

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No. 69-5031

ELMER BRANCH, *Petitioner,*

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STATE OF TEXAS, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

TION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF CI CURIAE OF THE NATIONAL ASSOCIATION FOR THE ADVANCE- T OF COLORED PEOPLE, NATIONAL URBAN LEAGUE, SOUTHERN ISTIAN LEADERSHIP CONFERENCE, MEXICAN-AMERICAN LEGAL ENSE AND EDUCATIONAL FUND, AND THE NATIONAL COUNCIL OF NEGRO WOMEN

T D. CLARK
w York University Law School
w York, New York 10003

AMUEL R. JONES
ional Association for the
ancement of Colored People
0 Broadway
w York, New York 10019

M JORDAN
ional Urban League
ast 52nd Street
w York, New York 10022

CHAUNCEY ESKRIDGE
Southern Christian Leadership Conference
110 South Dearborn Street, Suite 1500
Chicago, Illinois 60603

MARIO G. OBLEDO
Mexican-American Legal Defense and
Educational Fund
145 Ninth Street
San Francisco, California 94103

Attorneys for Amici

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Motion for Leave to File Brief Amici Curiae

The National Association for the Advancement of Colored People, the National Urban League, The Southern Christian Leadership Conference, the Mexican-American Legal Defense and Educational Fund, and the National Council of Negro Women, respectfully move the court for leave to file the attached brief amici curiae. The attorneys for the petitioners have consented to the filing, but except for the State of California, the attorneys for the respondent have refused.

Movants have never before asked leave of this court to file an amicus brief on previously presented aspects of the administration of capital punishment. We do so now because the decision of the court will have an unprecedented impact on the manner in which the death penalty is imposed upon the downtrodden and deprived minorities of this country, who too often are black.

Counsel for the Petitioners have covered admirably, we think, the aspects of the case which deals with fundamental violations of the Eighth and Fourteenth Amendments. While we are deeply concerned with those issues, we shall, to avoid repetition, treat principally the areas that bear with discriminatory harshness upon blacks, Mexican-Americans, the poor and other disadvantaged persons.

WHEREFORE, movants pray that the attached brief amici riae be permitted to be filed with the Court.

Respectfully submitted,

LEROY D. CLARK
New York University Law School
New York, New York 10003

NATHANIEL R. JONES
National Association for the
Advancement of Colored People
1790 Broadway
New York, New York 10019

VERNON JORDAN
National Urban League
55 East 52nd Street
New York, New York 10022

CHAUNCEY ESKRIDGE
Southern Christian Leadership
Conference
110 South Dearborn Street
Suite 1500
Chicago, Illinois 60603

MARIO G. OBLEDO
Mexican-American Legal Defense
and Educational Fund
145 Ninth Street
San Francisco, California 94103

Attorneys for Amici

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BRIEF OF AMICI CURIAE

Statement of Interest

This brief amici curiae is tendered by five national civil rights organizations which work to obtain, protect, and promote equal rights by lawful and peaceful means for black, Mexican-American and other minority-American citizens.

The National Association for the Advancement of Colored People, the National Urban League, The Southern Christian Leadership Conference, the Mexican-American Legal Defense and Educational Fund, and the National Council of Negro Women, are united by the harsh reality that capital punishment has become reserved almost exclusively for our nation's minorities.

The National Association for the Advancement of Colored People (NAACP) has a membership of 470,000 black and white belonging to 1,700 branches and offices throughout the nation. Since its inception in 1909, the NAACP played a key role in securing legislation providing additional enforcement machinery to deal with extra-legal forms of capital punishment and bigoted lawlessness. It has also sought to end racial discrimination, through our judicial system in all aspects of American life. Complementing the Association's legal spearhead are extensive programs to deal with racial factors in housing, education, employment, voter registration, and the administration of criminal justice.

The National Urban League, founded in 1910, is an interracial, non-partisan, non-profit organization. A national movement with over 98 autonomous local affiliates, the National Urban League seeks social and political equalization through channeling contributions received, to innovative

rojects designed to free blacks and other minorities from oor economic opportunities and unfair law enforcement.

The Southern Christian Leadership Conference (SCLC) as founded in 1957, and Dr. Martin Luther King was its rst President. Since its inception, SCLC's fundamental urpose has been the obliteration of all vestiges of racial partheid relying primarily on creative conflict-resolution nerated by non-violent techniques. Programs of SCLC nclude voter registration, increased participation of blacks n economic institutions ("Operation Breadbasket") and rojects aimed at the elimination of poverty.

Founded in 1967, the Mexican-American Legal Defense nd Educational Fund (MALDEF) is devoted to securing he constitutional rights of Mexican-American citizens hrough concerted effort in the courts and by preparing oung Mexican-Americans for legal careers . . . Since its nception four years ago, MALDEF has handled, through s four branches 90 per cent of the civil rights litigations ndertaken in behalf of Mexican-Americans.

The National Council of Negro Women began in 1935, ow includes a coalition of 25 national organizations and ncerned individuals; forming a network affiliating it with bout four million women throughout the United States. ts one hundred and thirty-seven (137) sections are in-olved in innovative program approaches to chronic depri-ation and need by supporting black women to conduct ousing, day-care, drug addiction, and self-help economic rojects, sponsored by the National Council.

Past statements and resolutions adopted by these organi-ations reflect the united interest of the parties participat-g in this brief. Addressing itself to the discriminatory pplication of capital punishment, the 1969 resolution by e Board of Directors of the National Urban League ated:

"There seems little question that the death pen
has been applied in a discriminatory fashion.
black and the poor suffer the extreme consequenc
numbers far out of proportion to their rates of cr
. . . Since 1930 of the nearly 4,000 persons execu
fifty-five (55) percent have been black, although
groes make up only eleven (11) per cent of our po
lation. Almost without exception, the victims of ex
tion have been poor. Statistics indicate that discri
nation because of race is rampant and the death pen
applied most often in instances of crimes by Negr
against whites. It is all too often the poor, the w
the ignorant and the black who have been execut

From the facts at hand they were led to conclude:

"Since we are convinced that the death penalty f
in its deterrent role; is patently unfair and discri
natory as applied to the poor and the black; dist
our legal system and the psychology of our nati
and may, in fact, be in violation of the Constitut
the National Urban League ardently endorses and
ports all efforts to have this most extreme form
punishment abolished."

In re-acknowledging the commitment of the Associa
against the imposition of capital punishment the 61st
nual Convention of the NAACP resolved:

"Whereas, the Constitution of the United States
America guarantees all persons without regard to r
color, creed or national origin equal protection u
the law,

Whereas, the sad facts of past and recent his
clearly demonstrate that the vast majority of pe

who have received the death penalty or are presently held in death row are blacks,

Whereas, many not so held in death row or in other facilities for crimes for which they were convicted by juries that did not in fact have representatives of that person's peer group.

Be It Therefore Resolved, that the National Office use its prestige and resources to press for the Supreme Court of the United States to abolish the death penalty as cruel and inhuman punishment violative of the equal protection clause and therefore unconstitutional."

Speaking in behalf of Mexican-Americans, caught in the criminal process, Mario G. Obledo, General Counsel for the Mexican-American Legal Defense and Educational Fund (MALDEF) has stated:

"Maldef believed that Mexican-Americans, particularly in the Southwestern United States, receive and have received the death penalty in greater frequency for similar crimes than their Anglo or White counterpart. Maldef is deeply concerned that the administration of justice system is depriving the Mexican-American of basic constitutional rights. The last man to be executed in the United States was a Mexican-American."

SCLC's position against capital punishment is related to its unique national reputation for steadfast espousal of non-violence for individuals and the State; its former leader, Dr. Martin Luther King was a victim of a modern style lynching while he was in the pursuit of the Ghandian ideals.

SCLC has not been deflected from its committment to the non-violent philosophy even in the case of Dr. King's death. On the occasion of the conviction of James Earl Ray for

the assassination of Dr. King, Mrs. Martin Luther King stated on behalf of the organization: "The death penalty for the man who pleaded guilty to the crime would be contrary to the deeply held moral and religious convictions of my husband and the present President of SCLC, Dr. Ralph D. Abernathy . . . Retribution and vengeance have no place in our beliefs."

The individual petitioners before this Court are engaged in a grim struggle for their lives and will undoubtedly seek to explore every facet of their case before this Court and any other public body or official whose actions may spare them. The undersigned, however, through their long, unceasing and continuing fight to erase the stain of racism from America, have a broader and more protective concern, for they speak not only on behalf of the instant petitioners, all of whom are black, but for the disproportionate number of disadvantaged minority group members who will in the future, if the past is any predictor, face the ultimate penalty.

It is only through organizations such as the undersigned that ethnic groups who have been peculiarly subjected to discrimination, but who still look to the constitution to protect their young from an unjust penalty, can have *their* day in Court, to state what *they*—who have been subjected to much of this society's inhumanity—believe are minimal standards for civilized administration of criminal justice. The undersigned organizations, because of their unique goals, have a special responsibility to place the death penalty before this Court within the full context of the struggle for racial justice.

Summary of Argument

I.

The total history of the administration of capital punishment in America, both through formal authority, and informally, is persuasive evidence, that racial discrimination was, and still is, an impermissible factor in the disproportionate imposition of the death penalty upon non-white American citizens.

II.

A. The available social science data is sufficient to substantiate the assertion that the death penalty is discriminatorily imposed in contravention to the Equal Protection Clause of the Fourteenth Amendment. However, where an inference exists that an impermissible factor is a basis for the imposition of the death penalty, the burden shifts to the state to refute that inference. To take a life, without refutation of that impermissible factor is inconsistent with the "cruel and unusual punishment" clause of the Eighth Amendment.

B. In view of the trend away from the imposition of formal and informal punishment on alleged black offenders, any lingering executions which "prima facie" have been affected by racial discrimination, violate contemporary American standards for civilized criminal justice; thereby constituting cruel and unusual punishment.

I.

Pre-1935 History of the Racially Discriminatory Use of Formal and Informal Capital Punishment by Whites Against Non-Whites.

A. *Slavery 1619-1865.*

The Court is faced with the ultimate in the use of public authority over its citizens—four black defendant's lives hang in the balance. The amici curiae, wish to place the penalty predicament of these four defendants within the total historical context of the infliction by whites of punishment upon non-whites, both through the formal public authority, and informally, in an attempt to assert that the contemporary phenomenon, capital punishment, is merely the grossest (because irremediable) and contemporary evidence, of continued racial discrimination operating to impose heavier burdens on the non-white population in the criminal process.

No attempt will be made here to focus on unprovoked, near-genocidal behavior, such as that which occurred in crossing the Atlantic during the slave trade,[1] or the near extinction of the American Indian due to systematic forays by white settlers on the western frontier. Nor will we cover the black fatalities due to white inflicted race riots, where the black victims were largely the by-product of general random violence, which, as they progressed, became hysterical reactions and not responses to specific offenses. We will concentrate on that form of racial hos-

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[1] Accurate figures with respect to the total number of slaves imported to the country do not exist, but estimates range up to fourteen million. "From Slavery to Freedom—a History of Negro Americans", pages 58-59, 3rd Edition (1966), John Hope Franklin. It has been further estimated that one-third of the blacks taken in Africa died on the coast and another third in crossing the ocean. "Slave and Citizen", pages 28-29 (1947), Frank Tannenbaum.

tility, approved or by the white majority, which controlled the dispensation of fatal penalties for alleged perpetrators of crime.

The most brutal and inhumane forms of punishment—crucifixion, burning and starvation—were legal under the slave codes in the early colonies and were used extensively because imprisonment would have been a reward, giving the slave time to rest, and fines could not be collected from unpaid laborers.[2] While one would imagine that the fact that the slave was conceived of as primarily an economic unit would make him totally immune to capital punishment, in fact, he was exposed to a higher liability than non-slaves in this regard under formal statutes:

> "State criminal codes dealt more severely with slaves and free Negroes than with whites. In the first place, they made certain acts felonies when committed by Negroes; and in the second place, they assigned heavier penalties to Negroes than whites convicted of the same offense. Every southern state defined a substantial number of felonies carrying capital punishment for slaves and lesser punishments for whites. In addition to murder of any degree, slaves received the death penalty for attempted murder, manslaughter, rape and attempted rape upon a white woman, rebellion and attempted rebellion, poisoning, robbery, and arson. A battery upon a white person might also carry a sentence of death under certain circumstances." [3]

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[2] "The Suppression of the African Slave Trade to the United States of America", page 6 (1954), W. E. B. du Bois.

[3] "The Peculiar Institution—Slavery in the Ante-Bellum South", page 210 (1956), Kenneth M. Stamp.

This pervasive authorization of capital punishment was, ironically, due to the fact that the slave trade was so thriving; often the masters of the slaves were so largely outnumbered that there was always the fear of violent rebellion.[4] The intense fear of violent reaction by blacks had its roots in the real security problems of the slave owners, but it has spread to the general populace in the South and to the North as blacks migrated and has had a continual impact on the white public's view of blacks charged with crimes against whites.

Capital punishment was also freely authorized for whites who interfered with slave discipline. North Carolina made death the penalty for concealing a slave "with the intent and for the purpose of enabling such slave to escape," and Louisiana made it a capital offense to use "language in any public discourse, from the bar, the bench, the stage, the pulpit, or any place whatsoever" that might produce "insubordination among slaves." The only brake on the actual imposition of capital punishment was the interest of the slave-owner in maintaining continuing production, but encouragement to use the penalty for slaves seen as particularly obstreperous existed by way of reimbursement of the owner for any slaves so disposed of.[5] Further, formal capital punishment was not needed to control slave rebellions for these were largely responded to with

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[4] Indeed, this appears to be the prime factor in abatement of the slave trade after the Eighteenth Century. This attests to the intensity and depth of the fear of blacks—because slavery was highly profitable for the whites involved. "The Suppression of the African Slave Trade", *supra*, p. 6.

[5] "White Over Black", p. 106 (1968), Winthrop Jordan.

immediate and ruthless counter-violence on the spot.[6] Such was the formal, explicit utilization of capital punishment during the slavery period—a use which was totally unrelated to the gravity of the crime, dangerousness of the offender, or any of the other oft asserted, superficially plausible justifications for the death penalty. The prime and express purpose of capital punishment in this context was to maintain the maximum threat for any reaction against the caste-like slave system.

B. *Lynching and Vigilantism 1882-1935.*

Immediately after slavery, when the freed men in the South came into economic competition with the white poor, and no longer could rely on the protection of their lives by white plantation owners, violence in the form of lynching—the informal mob resort to summary capital punishment for real or alleged crimes—increased sharply in severity:

> "From 1882 to 1903 the staggering total of 1,985 Negroes were killed by Southern mobs. Supposedly the lynch-mob hanging (or, too often, the ghastly penalty of burning alive) was saved for the Negro murderer or rapist; but the statistics show that Negroes were frequently lynched for lesser crimes or in cases where there was no offense at all or the mere suspicion of one. Lynch-mob violence became an integral part of the post-Reconstruction system of white supremacy." [7]

During this period 1,169 whites were also lynched, but the proportion of non-whites was approximately 60% of the

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[6] "Violence in America—Historical and Comparative Perspectives—a Staff Report to the National Commission on the Causes and Prevention of Violence", p. 39, Vol. I (1969), Hugh Graham & Ted Gurr.

[7] "Violence in America", Vol. I, page 38.

total [this includes 108 non-whites who were not black], a figure roughly paralleling the 53% of non-whites executed by way of capital punishment post-1930.[8]

Between 1903 and 1935, it has been estimated that an additional 1,015 blacks were lynched by white mobs. These figures do not include kangaroo court actions, unreported murders, or blacks killed in race riots.[9] It is clear, however, that by 1935 the recorded and easily identifiable lynchings were sharply in abatement. From a high of 130 killed in 1901,[10] and 70 in 1918,[11] lynching became almost non-existent, with 2 killed in 1950, 1 in 1951 and 1 each in the years 1957 through 1959.

We have been using the term "lynching" primarily based on the definition by the recent Violence Commission Reports; "The practice or custom by which persons are punished for real or alleged crimes without due process of law . . . an unorganized, spontaneous, ephemeral mob which comes together briefly to do its fatal work." Other non-white ethnic groups have been murdered primarily by another form of white lawlessness, namely Vigilante violence, a more organized and systematic usurpation of the functions of law and order. It was supported often by men occupying the high office of Senator and Congressman, and, when not being used to check horse thievery, it was used for racial intimidation of Mexican-Americans, Chinese and Indians.[12]

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[8] "Violence in America", Vol. I, *supra*, p. 57, footnote 27.

[9] "Violence in America", page 344, Vol. II (1969).

[10] "Race Relations and American Law", page 320 (1959), J. Greenberg.

[11] "Report of the National Advisory Commission on Civil Disorders", page 102 (1968).

[12] "Violence in America", Vol. I, *supra*, footnote, pages 40, 52.

"Not unmixed with vigilantism is frequently a fair share of racism, which has its own curious history on the American frontier. In some ways the frontier was the freest of places in which a man was judged on the quality of his work and his possession of such abstractions as honesty, bravery, and shrewdness. The Chinese merchant, the Negro cowboy, the Indian rider—all were admired because of what they could do within the frontier community and not because of their pigmentation. On the other and, the only good Indian was a dead Indian, 'shines' could seldom rise above the worker level, and 'coolies' were something to take potshots at without fear of retribution, either civic or conscience. Just as lynching a Negro in parts of the South was no crime, so shooting an Indian or beating an Oriental or a Mexican was equally acceptable. Like all societies, the frontier had its built-in contradictions." [13]

II.

The Disproportionate Numbers of Non-White Persons Executed by Formal Capital Punishment Constitutes Cruel and Unusual Punishment in Violation of the Eighth and Fourteenth Amendments of the Constitution.

The above material now brings us down to 1930, which is the earliest date for which statistics are available on persons executed after a formal trial. It is the thesis of this brief that this Court must evaluate the constitutional question of the arbitrary application of the death penalty within the context of prior history of official and non-official racial violence, and that the figures on capital punishment post-1930 can only be explained as a residual end product

[13] "Violence in America", Vol. I, *supra*, footnote, page 105.

of the prior practices of meting out the severest penalty on racial grounds. The capital punishment statutes under slavery would, by today's standards, clearly be unconstitutional, both as a denial of equal protection of the laws and as cruel and unusual punishment under the Federal Constitution. The Civil War has precluded that question from reaching this Court, but we see that historically, lynching and vigilantism, while technically not authorized by State statutes, historically performed the same function of domination and subjection on nonwhites by a white majority. When lynching and vigilantism were subsiding, the white-initiated race riot continued to play the lawless function of intimidation by fatalities in the early 1900's. [In time, that form of technically unapproved mass execution fell rapidly into disuse, but it is unbelievable that a society with such a history of ingrained and widespread use of violence against nonwhites as a prime reaction to perpetration of crime, could suddenly cease injecting racist considerations into the formal administration of justice.] It must be noted that all social science examination of the extent and depth of racial hostility by whites against nonwhites have reported that it has been pervasive and intense,[14] and as late as 1968, the National Advisory Commission on Civil Disorders could conclude:

> "Our Nation is moving toward two societies, one black, one white—separate and unequal." [15]

But the fact of the historical continuity need not rest on assertion of generalized racism in American society, for the current data creates the clear, to date, unrefuted inference that disproportionate imposition of the death penalty upon

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[14] See generally, "An American Dilemma", Myrdal, G.

[15] Report of the National Advisory Commission on Civil Disorders, page 1.

blacks and other minorities is a function of racial discrimination.

Based upon statistics compiled by the Federal Bureau of Prisons, 3,859 persons were executed in this country between 1930-1968. Of these 2,066 were blacks; 1,751 were whites and 42 were of other minority groups.[16] Proportionately, more than one half of the prisoners executed in this country were black during a period in which blacks constituted less than one tenth of the nation's population. More persuasive however, are the figures of persons executed for rape and murder. Of the 3,334 persons executed for murder, almost one half, 1,630 were blacks. Shocking however, is the fact that 1,231 of the blacks executed for murder were from the South.[17]

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[16] The figures below illustrate the racial composition of the prisoners executed between 1930-1967:

	Black	*White*	*Other*	*Total*
Rape	405 (89.0%)	48 (10.6%)	2 (0.4%)	455 (100%)
Murder	1630 (48.9%)	1665 (49.9%)	40 (1.2%)	3334 (100%)
Other	31 (44.3%)	39 (55.7%)	0 (0.0%)	70 (100%)
Total	2066 (53.1%)	1751 (45.4%)	42 (1.1%)	3859 (100%)

[17] The following is a breakdown by region, of prisoners executed for crimes of murder and rape, 1930-1968; 98% of the executions in the U.S. were for rape and murder.

Region	*Murder* *Total*	*White*	*Black*	*Other*	*Rape* *Total*	*White*	*Black*	*Other*
Northeast (9 States)	606	422	177	7	–	–	–	–
Northcentral (12 States)	393	254	137	2	10	3	7	–
South (16 States)	1,824	585	1,231	8	443	43	398	2
West (13 States)	496	393	82	21	–	–	–	–
Federal	15	10	3	2	2	2	–	–
Total	3,344	1,664	1,630	40	455	48	405	2

Equally as significant are the rape statistics, nationally 455 persons were convicted of rape. Of these 405 or 89% were black. As the figures indicate below, 443 convicted rapists were executed in the South, of these 398 were black.

Although the foregoing statistics give the overall impression that racial discrimination in the United States is the root cause of the disproportionate imposition of the death sentence on blacks and other minority groups, a systematic and extensive examination of differentials in capital sentencing was undertaken in the summer of 1965 by Dr. Marvin Wolfgang, a professor of Sociology at the University of Pennsylvania.[18] Briefly, the study was a survey of rape convictions during the period 1945-1965 of nineteen randomly selected counties in the State of Arkansas. The study compared the rate of death sentencing for black and white defendants all of whom were convicted of the crime of rape. The approach was to develop a "null hypothesis" that there is no difference in the distribution of the sentence of death or life imprisonment imposed upon black and white defendants. The principal variables considered were the race of the defendant, of the victim, and sentence. However, other data ranging from family status to circumstances at the trial were gathered and analyzed. From the Arkansas data, and his survey, Dr. Wolfgang concluded "that Negro defendants who rape white victims have been disproportionately sentenced to death by reason of race during the years 1945-1965 in the State of Arkansas."

The Wolfgang survey, although limited to the crime of rape, clearly substantiates the fact that the death penalty has been discriminately applied over the years in those states which retain the death penalty.

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[18] Dr. Marvin Wolfgang's study was extensively reviewed and discussed in *Maxwell* v. *Bishop*, 398 Fed. 138.

The above data confirms the hypothesis of the amici curiae, especially with respect to the data drawn from the South, that current figures showing the large proportion of nonwhites who were executed is merely the present phenomenon of racial discrimination being exercised against the nonwhite. Slavery was exclusively a Southern phenomenon, lynching was primarily a Southern phenomenon, and the general data with respect to all crimes, and particularly the crime of rape,[19] indicates that the South has been the prime contributor to the disproportionate application of the death penalty to blacks. If this data is coupled with other material showing the explicit Southern legisla-

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[19] The history of the South's use of the death penalty in rape cases during the period preceding the civil war, unmistakably shows the original official empathis for this region's discriminatory application of capital punishment. Of 15 jurisdictions which had separate penal laws for free persons and for slaves, in 9 jurisdictions (Alabama, District of Columbia, Georgia, Kentucky, Mississippi, Missouri, [the mandatory penalty for blacks was not death, but castration], Tennessee, Texas and Virginia). Rapes committed by whites were not punishable by death, while in the cases of rapes or attempted rapes upon white women committed by black men, the death penalty was mandatory. In Louisiana and Maryland the crime of rape committed by whites was punishable by death or terms of imprisonment, while in the case of blacks the death penalty was mandatory for the crime of rape or attempted rape upon a white woman. In the four remaining jurisdictions, Arkansas, Florida, North Carolina, and South Carolina, assault with intent to commit rape upon a white woman was a capital offense for a black man, but not for a white man. It is to be noted that in every jurisdiction but the District of Columbia and Mississippi, the statutes imposing more severe penalties for the crime of rape, or attempted rape, or assault with intent to commit a rape not only applied to slaves, but also expressly applied to "free persons of color", furthermore, in each one of the 15 jurisdictions the death penalty was mandatory (except in Missouri where the mandatory penalty was castration), for the crime of *attempted* rape upon a white woman by a black man, in none of these jurisdictions punishable by death if committed by a white man upon any woman, white or black, nor was that crime punishable by death if committed by a black man upon a black woman. The source of the above summary is included in Appendix A.

tion excluding blacks from juries[20] and, where that
longer obtained, the racial exclusion of blacks in admini
tration of jury selection,[21] we know that the capital pu
ishment figures are explained in part by the fact that t
bulk of the white population from 1930 through the 50's h
not totally expunged its racial prejudice, and was probab
allowing the race of the defendants to affect their jud
ment. It is precisely because of this phenomenon that so
of the amicus curiae have worked actively to reverse t
trend of the exclusion of non-whites from juries. To vo
to put a man to death requires the juror to place so
distance between himself and the defendant, and this pro
ess is facilitated if he can, because of some perception
the defendant, dehumanize him—racial prejudice can pl
exactly that function.

Amici curiae submit that the above data is sufficient
raise a claim on behalf of the instant petitioners that t
application of the death penalty has been discriminato
and violative of the equal protection clause of the Feder
Constitution. However, because some experts have que
tioned the definitive and conclusive nature of the dat
showing the role race has played in the application of t
death penalty, amici curiae assert that the cruel and u
usual punishment provisions of the Federal Constitution a
flexible enough to sustain this Court in voiding the dea
penalty in its present state of application on the basis
two propositions: (1) that where a defendant faces
irreversible penalty, and creates, through maximum deve
opment of contemporary social science data within his li

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[20] See, e.g., *Strauder* v. *West Virginia*, 100 U.S. 303 (1879).

[21] Race Relations in American Law, *supra*, footnote —, pp. 3
328.

[22] The Death Penalty In America (paperback edition), (p
411-413).

ited resources, an inference that an impermissible factor has controlled or modulated the imposition of such penalty, the burden shifts to the State to refute that inference, and in lieu of such refutation, it is cruel and unusual punishment to put the defendant to death. (2) The current trend of white imposition of formal and informal punishment on alleged black offenders shows a movement away from explicit, and lawless racial violence, a progressive reduction of the factor of race in meting out formal punishment such that any lingering executions which prima facie have been affected by race, would violate contemporary American standards for civilized criminal justice and constitute cruel and unusual punishment.

The cruel and unusual punishment provisions of the Eighth Amendment to the United States Constitution can best be described as dynamic, subject to interpretation based on the realities as existing in society, and the state of men's minds when its interpretation is before the Court. This Court has long ago acknowledged that great "difficulty would tend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishment shall not be inflicted." *Wilkerson* v. *Utah*, 90 U.S. 130, 135-136, 25 L. Ed. 345 (1878). Despite the difficulty in interpreting the "cruel and unusual punishment" clause this Court in *Weems* v. *United States*, 217 U.S. 399, 30 S.Ct. 544 (1910) held that a section of the Philippine Legal Code which imposed punishment disproportionately to the crime was likewise violative of the cruel and unusual clause. The Court clearly stated that the definition of cruelty shall be governed by the "contemporary standards." In *Weems*, the Court stated: "the clause of the Constitution in the opinion of commentators, may be therefore progressive and is not fashioned to be obsolete, but may acquire meaning as public opinion becomes enlightened by humane justice" 217 U.S. at 378. In *Trop* v.

Dulles, 356 U.S. 86, 78 S.Ct. 90 (1958), the Court in holding that de-nationalization for wartime desertion was cruel and unusual punishment, reaffirmed the "flexibility" of the Eighth Amendment as stated in *Weems*, and provided a new formula. It stated: "The Amendment must draw meaning from the evolving standards of decency that mark the progress of a maturing society," 356 U.S. at 101, 78 S.Ct. at 598.

Amici curiae assert that the clear sweep of American history, running from the period of slavery through the extra-legal and racially motivated lynchings, vigilantism and race riots shows an unmistakable and contemporary trend toward disuse and relinquishment of race as a basis for taking a man's life. White America has released its blacks from their status as slaves who faced official discriminatory application of the death penalty. There is no more Western frontier to conquer to act as the excuse for extermination of additional American Indians. Whites no longer organize vigilante parties against the rest of its Spanish-speaking and Oriental population: and, they have given up taking to the streets to murder blacks in race riots. It is true that white Americans left the street and entered the jury box to continue to exercise their racial animosity, but even this phenomenon has been on the decrease as the jury population recoiled from the application of capital punshment in general. From 1940 through 1960 more blacks were executed than whites each year. From 1951 to 1961, a higher number of blacks than whites were executed for 7 of the 10 years. Since 1962 there has been a reversal in this trend and for 5 of the 6 years more whites were executed than blacks, and in the last year (1967) the executions were even—1 white and 1 black.[23]

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[23] National Prisoner Statistics (1968), p. 7.

Racism, from which many receive concrete economic benefits and psychic sustenance, subsides with great resistance—especially given the current attempts by irresponsible politicians to revive fears in the white populace of the "black rebel" with the code words of "Law and Order." There is, however, some indication, that white America regardless of the continued racial discrimination in many facets of American life, desires,—at least with respect to capital punishment,—not to take a man's life simply because the color of his skin differs from theirs. It remains only for this Court to validate that direction.

We re-assert that this Court may find the continued application of the death penalty within the American context, as cruel and unusual punishment without a finding that race has controlled the death decisions to a statistical certainty. It need only find that the defendants have marshalled enough evidence, within the available social science data bearing on the subject, to create an inference that race has affected the application of the death penalty to the overwhelming number of men now on death row and that to execute the defendants under this state of the evidence is cruel and unusual punishment. We hasten to remind the Court that the overwhelming number of non-whites in this country, Indians, Black, Puerto Ricans and Mexican-Americans are poor, and that another inference created by the current social science data is that the class of the defendant, again an irrelevant factor in any rational criminal law system, may be a contributing element to their receipt of the death penalty. Another clear and unmistakable contemporary standard which this Court has consistently, and with elaboration begun to announce is that the indigency of a defendant should not be allowed to affect the outcome in a criminal prosecution. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Douglas* v. *California*, 372 U.S. 353 (1963). This standard should

reinforce the holding which amici curiae argue for, namely that defendants' inability, due to their indigency and consequent lack of resources, to produce statistically certain proof of the discriminatory application of the death penalty cannot be allowed to cause their deaths. To place a burden of proof on indigent defendant beyond that which he has resources to sustain,[24] especially where he has established a prima facie case that an irreversible penalty will be applied to him unconstitutionally, is itself cruel and unusual punishment. This Court can legitimately take the small step of merging its evolving protection for blacks and indigents under the equal protection clause, with the announcement of this minimal civilized standard for controlling the ultimate penalty available in a criminal justice system. To look back twenty years from now when the statistical data is in an even more developed shape and to find that post 1971 men had still been put to death for being non-white, and not possessed of sufficient resources to give further proof of it, would be a travesity of justice.

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[24] There is also some serious question as to whether any defendant, even with unlimited resources, could offer proof beyond that which is current that the death penalty has been applied discriminatorily. Record keeping has varied over the years, trial transcripts do not reveal all the pertinent data. If proof of past jurors' subjective state of mind were required, that would be impossible. The vast number of variables which impinge upon any complex human behavior make it difficult to isolate one as a single causative factor in explaining any human event. But where the cost to the defendant is so total, and the interest of the State so minimal, the Court must find some formula for giving credence to maximum amount of information which defendant facing terminal penalty could produce, given the inherent compromises on ideally definitive data.

CONCLUSION

ital Punishment clearly violates the equal protection
of the Fourteenth Amendment, and the cruel and
al clause of the Eighth Amendment, it should on
asis be ruled unconstitutional.

Respectfully submitted,

LEROY D. CLARK
New York University Law School
New York, New York 10003

NATHANIEL R. JONES
National Association for the
Advancement of Colored People
1790 Broadway
New York, New York 10019

VERNON JORDAN
National Urban League
55 East 52nd Street
New York, New York 10022

CHAUNCEY ESKRIDGE
Southern Christian Leadership
Conference
110 South Dearborn Street
Suite 1500
Chicago, Illinois 60603

MARIO G. OBLEDO
Mexican-American Legal Defense
and Educational Fund
145 Ninth Street
San Francisco, California 94103

Attorneys for Amici

Appendix A

Pre-Civil War History of Punishment for Rape in Southern States and Washington, D.C.

ALABAMA

whites: An act of 1802 provided that rape shall be punished by death. Harry Toulmin, Digest of the Laws of the State of Alabama 207 (1823). In 1841, the punishment for rape was changed to life imprisonment. C. C. Clay, Digest of the Laws of the State of Alabama 414 (1843).

slaves, free negroes, and mulattoes: An act of 1814 provided that a slave convicted of an attempt to rape a white woman shall suffer death. Harry Toulmin, Digest of the Laws of the State of Alabama 185 (1823). The 1841 Penal Code of Slaves and Free Negroes provided that a slave, free negro or mulatto convicted of the crime of rape upon, or an attempt to rape upon, a white woman shall suffer death. C. C. Clay, Digest of the Laws of the State of Alabama 472 (1843).

ARKANSAS

whites: The punishment for rape is death. Act of Dec. 14, 1842 in Josiah Gould, A Digest of the Statutes of Arkansas 334 (1858).

negroes and mulattoes: The punishment for rape is death; the punishment for attempted rape of a white woman is death. *Id.* at 335.

DISTRICT OF COLUMBIA

whites: A Code of Laws for the District of Columbia published in 1819 by the Judges of the Circuit

Court and the Attorney for the District of Columbia, who had been authorized by Congress to prepare a code of jurisprudence for the District, recommended that free persons convicted of the crime of rape be punished with two to twenty (20) years of imprisonment. This Code was not adopted. W. Cranch, Code of Laws for the District of Columbia 235 (1819).

A Penal Code published by order of the Senate on February 28, 1833, provided that rape was punishable by life imprisonment. A System of Civil and Criminal Law for the District of Columbia 367 (1833).

The penal law in effect in 1857 provided that rape of a man's daughter or sister shall be punished by life imprisonment and rape of any other woman or child shall be punished by five to twenty (20) years imprisonment, for the first offence, and life imprisonment for the second offence. Revised Code of the District of Columbia 518-519 (1857). An assault with intent to commit a rape was punishable by three (3) to fifteen (15) years imprisonment. *Id.* at 58.

slaves: The punishment for attempting to commit a rape upon a white woman is death. Worthington G. Snethen, Black Code of the District of Columbia 18 (1848).

FLORIDA

whites: The punishment for rape is death. Act Feb. 10, 1832, §2 in Leslie A. Thompson, Manual or Digest of the Statute Law of the State of Florida 490 (1847).

slaves, free negroes, or mulattoes: An act of 1828 provided that any negro or mulatto who assaults a white woman or child with intent to commit a rape shall be cropped, branded or suffer death, at the discretion of the court. Acts of the Legislative Council of the Territory of Florida, 1827-8, 109 (1828). An act of 1840 provided that the punishment for rape or assault with intent to rape a white woman shall be death. Act March 2, 1840, §2 in Leslie A. Thompson, Manual or Digest of the Statute Law of the State of Florida 538 (1847).

GEORGIA

whites: Punishment for rape is imprisonment at hard labor for not less than seven nor more than sixteen years. Lucious Q. C. Lamar, Compelation of The Laws of Georgia 552-1821. In 1816, the penalty for rape in the penal code was changed to imprisonment for not less than two nor more than twenty years, and a section was added punishing attempted rape by imprisonment by for not less than one nor more than five years.

Lamar, supra p. 571.

Between 1816-1861 a rape by a white person upon a free white female remained punishable by imprisonment for no less than two, nor more than twenty years; rape upon a slave or free person of color was made punishable by fine and imprisonment at the discretion of the Court.

An assault with intent to commit rape remained punishable with one to five years of imprisonment. Clark, Cobb, Irwin, Code of The State of Georgia, Penal Code, §§ 4248-4250, p. 824 (1861).

slaves, free negroes: In 1816 the punishment for th crime of rape or attempted rape of a free whit female was death. Lamar, supra, p. 804.

Between 1816-1861 rape upon a free white femal remained punishable by death. Attempted rap upon a free white female was punishable by deat or such other punishment as the Court might pre scribe. Clark, Cobb, Irwin, Penal Code For Slav and Free Persons of Color, §§ 7704, 4708, page 91 (1861).

KENTUCKY

whites: An act passed in 1798 provided that rape shal be punished by imprisonment for four to twenty one (21) years. Morehead and Brown, Digest o the Statute Laws of Kentucky, Vol. II, 1265 (1834) In 1801 the penalty for rape was changed to im prisonment from ten to twenty-one (21) years. *Id* at 1269. In 1813 an act was passed which mad rape "upon the body of an infant under the ag of twelve years" punishable by death. Littell an Swigert, Digest of the Statute Law of Kentucky Vol. II, 1009 (1822).

The Revised Statutes of Kentucky in force from July 1, 1852, and published in 1867, retain the death penalty for a rape upon an infant under the age of twelve years. Richard H. Stanton, Revised Statutes of Kentucky, Vol. 1, 379 (1967). Rape of a white woman is punishable by imprisonment from ten to twenty years, the same punishment applies to carnal knowledge of a white girl under the age of ten years. *Id.* at 379-80.

slaves and free negroes: The act of 1801 provided that slaves shall be punished by death for rape com-

mitted upon a white woman. Morehead and Brown, Digest of the Statute Laws of Kentucky, Vol. II, 1282 (1834). In 1811, an attempt to commit a rape upon a white woman by a slave was made punishable by death. *Id.* at 1288.

By 1867, free negroes as well as slaves were punished by death for rape upon a white woman or an attempt to commit such rape, or for being an accessory before the fact to either of these crimes. Richard H. Stanton, Revised Statutes of Kentucky, Vol. II, 375 (1867).

LOUISIANA

whites: A proposed System of Penal Law published in 1833 as a result of a commission from the General Assembly of Louisiana provided that the punishment for rape should be life imprisonment. Edward Livingston, A System of Penal Law for the State of Louisiana 435 (1833).

An act passed in 1855 provided that the punishment for rape shall be death. However, a companion provision gave juries the power to substitute life imprisonment for the death penalty. Acts [1855], Nos. 120, §4 and 121, §25. In 1855, the maximum penalty for assault with intent to commit a rape was two years imprisonment. U. B. Phillips, Revised Statutes of Louisiana 136 (1856).

slaves and free colored persons: An act passed in 1855 provided that slaves and free colored persons shall be punished by death for rape upon or attempted rape upon a white female. Acts [1855] No. 308 §6.

MARYLAND

whites: By an act of 1810, the punishment for r
was death or imprisonment for not less than
year nor more than twenty-one (21) years, at
discretion of the court. Kilty, Harris and W
kins, The Laws of Maryland, Vol. IV, Nov. 1
Ch. 138 §4. In 1860 the punishment for rape
death or imprisonment for not less than eight
months nor more than twenty-one (21) years
the discretion of the court. Scott and M'Cullou
The Maryland Code, Vol. I, 242 (1860). The p
ishment for assault with intent to rape was
prisonment for not less than two nor more t
ten (10) years. Scott and M'Cullough, Revi
Laws of the State of Maryland 209 (1859).

negro or mulatto slave: An act of 1819 made it
lawful for a court to sentence any negro or
latto slave to imprisonment, and in effect m
the death penalty mandatory in case of ra
Kilty, Harris and Watkins, The Laws of Ma
land, Vol. VI, 1818, Ch. 197 §1. For an ass
with intent to rape, the court had discretion, un
the terms of this act, to sentence any slave
be whipped or to banishment from the state.
2. The law in 1860 provided where the punishm
would be imprisonment were the defendant wh
the negro slave shall be sentenced to be sold
of the state for such term as he may have
serve. Scott and M'Cullough, The Maryland Co
Vol. I, 250 (1860). In the case of a free neg
he shall be sentenced to be sold either in or
of the state, at the discretion of the court,
such term as a white man for the same offe
would be sentenced to imprisonment. *Ibid.*

negroes or mulattoes (free or enslaved): In 1859 the punishment for impregnation of a white woman was that he be sold beyond the limits of the state as a slave for life. Scott and M'Cullough, Revised Laws of the State of Maryland 242 (1859).

MISSISSIPPI

whites: An act passed June 14, 1822, provided that the punishment for rape shall be death and the punishment for assault with intent to rape shall be a fine and not more than imprisonment for one year. Revised Code of the Laws of Mississippi, Ch. 54, §§6 and 11, 297, 298 (1824).

In 1839 the punishment for rape was changed to not less than ten (10) years imprisonment. 1839 Laws (Adjourned Session, Jan. 7 to Feb. 16, 1839), Ch. 66, 116. The penal laws were expressly extended to all free persons of color. *Id.* at 190.

By 1857 the punishment for rape had been changed to life imprisonment. Revised Code of the Statute Laws of the State of Mississippi, Art. 218, 608 (1857).

slaves: The act of June 18, 1822, provided that the punishment for an attempt to rape a free white woman or child shall be death. Revised Code of the Laws of Mississippi, Ch. 73, §55, 381 (1824). Slaves were not affected by the act of 1839 which eliminated the death penalty for rape. 1839 Laws (Adjourned Session, Jan. 7 to Feb. 16, 1839), Ch. 66, 190. The Revised Code of 1857 provided that slaves shall suffer death for rape upon or an attempt to rape any white woman, or for having "carnal connexion" or attempting to have "such

connexion" with any white female child under the age of fourteen years. Revised Code of the Statute Laws of the State of Mississippi, Art. 68, 248 (1857).

MISSOURI

whites: In 1818, the law of the Missouri Territory provided that the punishment for rape shall be castration. Henry S. Geyer, Digest of the Laws of Missouri Territory 137 (1818).

In 1825, after Missouri had become a state, rape remained punishable by castration, and an assault with intent to rape was punished by imprisonment for not more than seven (7) years. Laws of the State of Missouri: Revised and Digested, Vol. I, 283 (1825).

In 1835, the punishment for rape was changed to imprisonment for not less than five (5) years. The Revised Statutes of the State of Missouri 170 (1835).

slaves, negroes, or mulattoes: The law of the Missouri Territory punished rape by a slave with castration. Henry S. Geyer, Digest of the Laws of Missouri Territory 158 (1818).

In 1825, the law of the State of Missouri provided that in the case of slaves, rape upon any person, or attempt to commit a rape upon a white woman, shall be punished by castration. Laws of the State of Missouri: Revised and Digested, Vol. I, 283 (1825).

In 1835, when the punishment for rape by whites was changed to a term of imprisonment, rape upon, or an attempt to commit a rape upon, a white fe-

male by any negro or mulatto was made punishable by castration. The Revised Statutes of the State of Missouri 170-71 (1835).

NEVADA

An act passed in 1861 provided that the punishment for rape shall be imprisonment for not less than five years to life imprisonment, and the punishment for assault with intent to rape shall be not less than one nor more than fourteen years imprisonment. Bonnifield and Healy, Compiled Laws of the State of Nevada, 1861-1873, Vol. I 557 (1873).

NORTH CAROLINA

whites: The punishment for rape was death. Revised Statutes of the State of North Carolina, Vol. I, 192 (1837).

"persons of color": The punishment for rape or for an assault upon a white female with intent to commit a rape was death. *Id.* at 590.

SOUTH CAROLINA

whites: An act enacted in 1712 provided that rape shall be punished by death. Thomas Cooper, Statutes At Large of South Carolina, Vol. II, 498 (1837).

slaves or free persons of color: By an act enacted in 1843, the punishment for an assault upon a white woman with intent to rape is death.

TENNESSEE

whites: Rape was punished by imprisonment for not less than ten nor more than twenty-one (21) years. Assault with intent to commit a rape was pun-

ished by imprisonment for not less than two no more than ten (10) years. Meigs and Cooper, Cod of Tennessee 830 (1858).

slaves and free persons of color: Rape upon or a assault with intent to commit rape upon a fre white female, and having or attempting to hav sexual intercourse with a free white female unde twelve years of age, were punished with death *Id.* at 509, 524.

TEXAS

whites: An act of Aug. 28, 1856 provided that the pun ishment for rape shall be not less than five no more than fifteen years imprisonment. Oldhar and White, A Digest of the General Statute Law of the State of Texas, Penal Code Art. 529, p. 52 (1859).

slaves and free persons of color: An act of Feb. 12 1858 provided that the punishment for rape, as sault with intent to rape, or attempted rape upo a free white woman is death. *Id.*, Art. 819 an Art. 823, 562-63.

VIRGINIA:

whites: An act passed in 1819 provided that the pun ishment for rape shall be imprisonment for term not less then ten nor more than twenty-on (21) years. Revised Code of the Laws of Vir ginia, Vol. I, 585 (1819). A Code published i 1860 states that rape is punishable by imprison ment for not less than ten nor more than twenty (20) years. Code of Virginia (2d ed.) 785 (1860)

slaves and free negroes: The act of 1819 provided tha in the case of slaves, the punishment for rape shal

be death and the punishment for attempted rape upon a white woman shall be castration. Revised Code of the Laws of Virginia, Vol. I, 585 (1819). The Code of 1860 provided that in the case of slaves, rape upon or attempted rape upon a white woman shall be punished by death, and in the case of free negroes, rape upon or attempted rape upon a white woman shall be punished by death or by imprisonment for not less than five nor more than twenty (20) years, at the discretion of the jury. Code of Virginia (2d ed.) 815-16 (1860).

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1971

NO. 68-5027

EARNEST JAMES AIKENS, JR.,

Petitioner,

-vs-

THE STATE OF CALIFORNIA,

Respondent.

BRIEF AMICUS CURIAE

LUKE McKISSACK
Attorney at Law
6430 Sunset Boulevard
Suite 521
Hollywood, Calif.90028
[213] 466 7331

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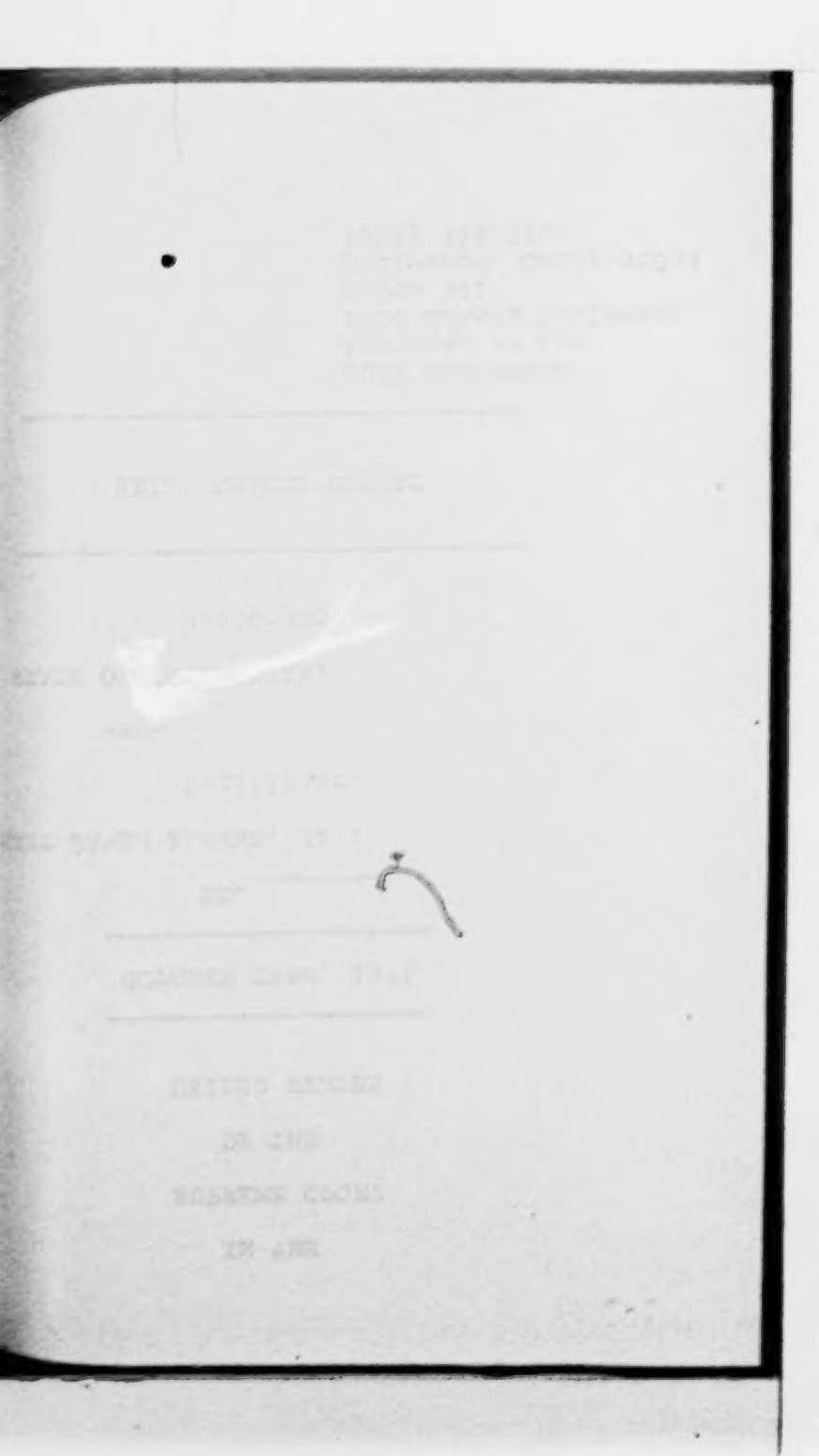

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PREFACE

The presentation of this Amicus Curiae brief on behalf of Petitioner Aikens is generated by the fact that counsel represents two inmates on California's death row - Sirhan Sirhan and Jesse James Gilbert - plus one who has spent eleven years there and is currently awaiting his fifth death penalty retrial, Doyle Alva Terry. All of these persons stand to be gravely affected by this Court's decision in Aikens.

Previously, counsel filed an Amicus Curiae brief in McGautha v. California, 91 S.Ct. 1454 (1971). Finally, counsel has presented briefs and made arguments against the death penalty in cases for many years.

I

PETITIONER IS SUBJECT TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY BEING SENTENCED TO DEATH FOR THE CRIME OF MURDER. TO WIT, THE STATE OF CALIFORNIA IN IMPLEMENTING THOSE PENAL OBJECTIVES IT DEEMS LEGITIMATE CAN DO SO BY MEANS LESS SUBVERSIVE OF THE RIGHT TO LIVE - NAMELY BY SENTENCING PETITIONER TO LIFE IMPRISONMENT.

Petitioner is under sentence of death which will result in his execution if this Court does not intervene to prevent it. It is the position of Amicus Curiae that in our system of justice life is sacred and indispensable to the enjoyment of all other rights guaranteed us under the Constitution. To interfere with such fundamental liberties, the State of California must show a "compelling

need" to exterminate Petitioner in order to effectuate the defensible purposes of the criminal law. As this Court declared in Bates v. Little Rock, 361 U.S. 516,524, 80 S.Ct. 412,417 (1960),

> "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."1/

The loss of life indisputably involves the loss of all liberties, and, thus, capital punishment remains the most far-reaching encroachment on personal liberty known to man. Therefore, a penalty as final as death2/ is allowable only if those defensible purposes of the criminal

1/ See also, Sherbert v. Verner, 374 U.S.398, 404,fn.6,406, 83 S.Ct. 1790,1794,fn.6,1795 (1963) Thomas v. Collins,323 U.S.516,530, 65 S.Ct.315, 323 (1945); N.A.A.C.P. v. Dutton, 371 U.S.415, 438-444, 83 S.Ct.328,340-343 (1963); Parrish v. Civil Service Commission,66 Cal.2d260,271, 57 Cal Rptr.623 (1967).

2/ When the death sentence is meted out, effectively a class of persons is created who cannot receive the benefits of future changes in the

aw can be vindicated by no alternative means ess subversive of the right to live. Otherwise, he State of California will have inflicted the oss of life without any commensurate justifi- ation. This argument we now proceed to analyze.3/

aw which may accrue to their benefit such as he declaring of the "Little Lindbergh Law" nconstitutional which would have saved the ife of Chessman were he still living at the ime of the decision. [See People v. Daniels, 1 Cal.2d 1119, 80 Cal.Rptr. 897 (1969). oreover, it denies the ameliorative prospects f legislative change in the form of legalizing he formerly condemned behavior or diminishing he penalty; finally, prospects for future proof f innocence and pardon disappear with the defen- ant's execution. And innocence subsequently iscovered is not foreign to our system of ustice. See cf., Frank & Frank, Not Guilty, 1957); Borchard, Convicting the Innocent (1932). utherland & Cressey, Principles of Criminology 5th Ed.1955),p.297; Charles E. O'Hara & James . Osterburg, "Some Miscarriages of Justice nalyzed in the Light of Criminalistics", Chapter 7 of An Introduction to Criminalistics (New York; acMillan,1949),pp.680-685; Lewis L. Lawes, Twenty housand Years in Sing Sing,(New York: R.Long & .R. Smith,1932),pp.146-147,156; Frank E. Hartung, n Capital Punishment, Detroit; Wayne University ept. of Sociology & Anthropology,1951,p.22; Otto ollak, "The Errors of Justice",Annals of the merican Academy of Political & Social Science, 84:115-123,November, 1952. Imprisonment keeps all f these possibilities viable. It may be that a erson while in prison will die a natural death or o change will ensue but that is not a state re- sponsibility. What is directly attributable to the eath penalty is the eternal ineligibility for elief that is denied to no other prisoner.

The two cardinal manifestos of the American political and jurisprudential conscience, the Declaration of Independence and the United States Constitution, embody the precept that life is a most precious commodity. The Declaration of Independence proclaims that our Government is indeed formed to guarantee certain inalienable rights, most notably "life, liberty and the pursuit of happiness". The Fifth Amendment to the United States Constitution provides that no person may "be deprived of life, liberty or property without due process of law". In both documents, man's life is not only the first named, but the most eminent concern of the State.

3/ While this type of inquiry is cast in due process terms and is not coextensive with the phrase "cruel and unusual" punishment, the two have routinely been intertwined in the analysis of appellate courts. See e.g., Rudolph v. Alabama, 375 U.S. 889, 84 S.Ct. 155,156 (1963); Jackson v. Bishop (8th Cir.1968) 404 F.2d 571; In re Anderson, 69 Cal.2d 613,629, 73 Cal.Rptr.21,33 (1968).

It has been held since time immemorial that
e State's right to punish, much less kill,
nnot be based on whim or caprice. Weems v.
ted States, 217 U.S. 349, 30 S.Ct. 544 (1910).
cannot punish a man at all for his addiction
drugs [Robinson v. California, 370 U.S. 660,
S.Ct. 1417 (1962)], or for acquiring a common
d [ibid;667], or for simply being an alcoholic
. Powell v. Texas, 392 U.S. 514, 88 S.Ct.
5 (1968)]. Furthermore, even the type of
alty is subject to considerable restraint.
example, it has been held that whipping is
mpermissible punishment [Jackson v. Bishop,
a]. Thus, there is ample precedent for re-
ing the State to demonstrate a legitimate
s for the punishment imposed. Moreover,
shments far less severe and final than that
ht to be imposed here have been ruled viola-
of the Cruel and Unusual Punishment provi-
in the Constitution. See Jackson v. Bishop,

supra, cases cited at p.580.[4]

Chief Justice Warren declared for four members of this Court in Trop. v. Dulles, 356 U.S. 86,100, 78 S.Ct. 590 (1958):

> "This Court has had little occasion to give precise content to the Eighth Amendment."

and, in observing that its contents were not fixed, commented,

> ". . .[the Eighth Amendment] must draw its meaning from evolving standards of decency that mark the progress of a maturing society." [Ibid,at 101; see also Rudolph v. Alabama,supra, at p.889; Jackson v. Bishop,supra, at 579.]

The Chief Justice finally noted that the basic concept enshrined in the Eighth Amendment was "nothing less than the dignity of man".

4/ It stands to reason that if an adequate State interest is required to render conduct criminal, that an adequate State interest is needed to justify the punishment also.

Thus, although capital punishment has been regarded by this Court previously [Wilkerson v. Utah, 99 U.S. 130 (1878)] as not violative of the Cruel and Unusual Punishment clause, this society's maturation, attested to by the lack of a single execution since June 2, 1967, and the preservation of over 700 persons who are under sentence of death, commands that the question be considered anew.

The right of the State of California to punish those who commit murder is beyond question But since the infliction of the death penalty is grave and irremediable, it is essential that we examine those purposes of the criminal law deemed justifiable by that State (California) in penalizing those who perpetrate crimes,in order to ascertain whether the State can demonstrate a "compelling interest" in retaining the death penalty for homicide.

It is clear that California does not regard vengeance or retribution as a permissible

basis for incarceration or execution. In re Estrada, 63 Cal.2d 740,745, 48 Cal.Rptr.172, 176 (1966). As the Court stated therein:

"There is no place in the scheme for punishment for its own sake, the product of vengeance or retribution."

[See Michael & Wechsler on"Criminal Law and Its Administration" (1940), pp.6-11; Note,55 Col.L.Rev.,pp.1039,1052; see also, In re Anderson,supra, at 630.]

This leaves then, as the potentially proper functions of punishment, isolation, rehabilitation and deterrence. Of those, California has also ruled out deterrence as a permissible basis for administering the death penalty. As the California Supreme Court stated in People v. Love, 56 Cal.2d 720, 731, 16 Cal.Rptr.,777,782-783 (1961),:

"Prosecutors have often stated that it is necessary swiftly and

severely to punish the guilty, and such statements have usually been considered within the bounds of proper argument . . .In the present case, however, the prosecutor went beyond merely using severe punishment. He stated as a fact the vigorously disputed proposition that capital punishment is a far more effective deterrent than imprisonment. The Legislature has left to the absolute discretion of the jury the fixing of the punishment for first degree murder. . . There is thus no legislative finding, and it is not a matter of common knowledge, that capital punishment is or is not a more effective deterrent than imprisonment. Since evidence on this question is inadmissible, argument thereon by the prosecution or defense could serve no useful purpose, is apt to be misleading, and

is therefore improper."

See also, People v. Bickler,57 Cal.2d 788,793, 2 Cal.Rptr, 340 (1962); People v. Lane, 56 Cal. d 773,786, 16 Cal.Rptr.801 (1961); People v. idd, 56 Cal.2d 759,770, 16 Cal.Rptr. 793 (1961).)

The body of authorities shattering the yth that the death penalty acts as a deterrent s enormous.5/ Suffice it to say, as in the ase of revenge, California has decided that the eath penalty is not warranted as a deterrent murder. Thus, the permissible foundations r criminal penalties which remain are isolation d rehabilitation. To state that a murderer y be isolated from society through incarceration

5/ Thorten Sellin, "Common Sense and The Death nalty", Prison Journal, October,1932, p.12; therland & Cressey, Principles of Criminology, th Ed.1955),pp.292-295; Karl F. Schuessler, he Deterrent Influence of the Death Penalty", nals of the American Academy of Political & cial Science; 284:54-62, November, 1952. G.B. ld, "Can the Death Penalty Prevent Crime?", e Prison Journal, October 1932,pp.3-8; Robert Dann, "The Deterrent Effect of Capital Punishnt", Friends Social Service Series, Bulletin . 29, 1935.

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ct", Friends Social Service Series, Bulletin
, 29, 1915.

is to state an evident tautology. And the number of criminals who are capable of being rehabilitated through the death penalty is none,[6] thus the State of California does not have a "compelling interest" in obtaining Petitioner's death.

Lest it be contended that execution is more economical than life imprisonment, we summon forth the stern admonition of Mr. Justice Blackmun in Jackson v. Bishop, supra. In declaring whipping to be violative of the Cruel and Unusual Punishment provision, he resolved that:

> "We are not convinced contrarily by any suggestion that the State needs this tool for disciplinary purposes and is too poor to provide other accepted means of prisoner regulation. Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations or by the thickness

[6] Even those persons having profound religious convictions must surely concede that the number of resurrections appears to be minimal.

of the prisoner's clothing."[at p.580.]7/

ough it is clear that the State cannot justi-
illing members of its population to avoid
dget increase, the swelling number of
oners on death row, the lengthy nature of
als, etc., suggest that it is actually more
nsive to execute a man than to incarcerate
for life.8/

It is also worthy of note that the State
lifornia has little trouble expressing
f when it deems specified behavior deserv-
f the death penalty. For four separate
s, the California legislature has dictated
result.9/ In all other cases, the matter
ft up to the jury without guideposts to

t is not necessary here to detail the various
ents against the death penalty such as the
, the "omnipresent teacher", using the death
ty to cheapen the respect for human life.
erbert B. Ehrmann, "The Death Penalty and
dministration of Justice," Annals of the
y of Political & Social Science,284:73-84,
er, 1952.

reason [Calif.Pen.Code§37]; Perjury procuring
nocent's death [Calif.Pen.Code§128]; Train
ng with bodily harm [Calif.Pen.Code §219],
t by a lifer causing death of a non-inmate
.Pen.Code§4500].

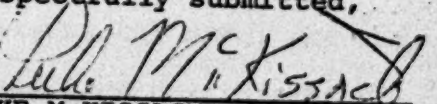
make an appropriate determination.[10] Thus, the State of California, which has survived without an execution since April 12, 1967, has not asserted a "compelling interest" in exacting a human life as the penalty for murder. As explained above, the purposes of the criminal law are satisfactorily effectuated by life imprisonment - a means less subversive to the right to live. California has shown no "compelling interest" which would warrant rendering Petitioner extinct.

[10] Calif.Pen. Code §§190 and 190.1.

CONCLUSION

Petitioner's sentence of death should be reversed.

Respectfully submitted,



LUKE McKISSACK
Amicus Curiae in support
of Petitioner

CONCLUSION

Petitioner's sentence of death should be reversed.

Respectfully submitted.

LUKE MCKISSACK
Amicus Curiae in support
of Petitioner

APPENDIX

California Penal Code, Section 190:

MURDER; PUNISHMENT; DISCRETION OF JURY

Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the court or jury trying the same, and the penalty of punishment shall be determined as provided in Section 190.1. And every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life.

APPENDIX

California Penal Code, Section 190.1:

SENTENCE OF DEATH OR IMPRISONMENT FOR LIFE; DETERMINATION; MINORS UNDER 18

The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without any inquiry as to penalty. If such person has been found guilty of an offense punishable by death or imprisonment or death, and has been found

APPENDIX

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MURDER; PUNISHMENT; DISCRETION OF JURY

Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the court or jury trying the same, and the matter of punishment shall be determined as provided in Section 190.1, and every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life.

California Penal Code, Section 190.1:

SENTENCES OF DEATH OR IMPRISONMENT FOR LIFE; DETERMINATION: MINORS UNDER 18

The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, and has been found

APPENDIX

sane on any plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of proof as to the age of said person shall be upon the defendant.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall

be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived. If the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges that jury in which case a new jury shall be drawn to determine the issue of penalty.

In any case in which defendant has been found guilty by a jury, and the same or another jury, trying the issue of penalty, is unable to reach a unanimous verdict on the issue of penalty, the court shall dismiss the jury and either impose the punishment for life in lieu of ordering a new trial on the issue of penalty, or order a new jury impaneled to try the issue of penalty, but the issue of guilt shall not be retried by such jury.

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STATE OF CALIFORNIA

E OF THE ATTORNEY GENERAL

partment of Justice

TE BUILDING, LOS ANGELES 90012

17 West First St.

August 27, 1971

t, Esq.
vd., Suite 521
California 90028

Aikens v. California
68-5027

sack:

ccordance with previous oral
s made to you, respondent in
er hereby gives its consent
a brief amicus curiae in this

Very truly yours,

EVELLE J. YOUNGER, Attorney General

By Ronald M. George
RONALD M. GEORGE
Deputy Attorney General

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STANFORD LAW SCHOOL
STANFORD, CALIFORNIA 94305

August 30, 1971

-SPECIAL DELIVERY

ssack, Esq.
et Boulevard, Suite 521
es, California 90028

re: Aikens v. California
O.T. 1971, No. 68-5027

McKissack:

rsuant to Rule 42(2), I am pleased to consent
of petitioner Aikens to your filing a brief
riae in this matter. I understand that you will
to have the brief filed on the due date, and hav
on to its late filing.

Sincerely,

Anthony G. Amsterdam

AMICUS

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AUG 3 1 1971

In the

Supreme Court of the United States

Supreme Court, U. S.
FILED
OCT 12 1971
MICHAEL RODAK, JR., CLERK

October Term, 1971

No. 68-5027

AIKENS, *Petitioner,*

—v.—

CALIFORNIA, *Respondent.*

No. 69-5003

FURMAN, *Petitioner,*

—v.—

GEORGIA, *Respondent.*

No. 69-5030

JACKSON, *Petitioner,*

—v.—

GEORGIA, *Respondent.*

No. 69-5031

BRANCH, *Petitioner,*

—v.—

TEXAS, *Respondent.*

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

GERALD H. GOTTLIEB
210 W. 7th Street
Los Angeles, California 90010

MELVIN L. WULF
SANFORD JAY ROSEN
American Civil Liberties
Union Foundation
156 Fifth Avenue
New York, New York 10010

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IN THE

Supreme Court of the United States

October Term, 1971

No. 68-5027

AIKENS, *Petitioner,*

—v.—

CALIFORNIA, *Respondent.*

No. 69-5003

FURMAN, *Petitioner,*

—v.—

GEORGIA, *Respondent.*

No. 69-5030

JACKSON, *Petitioner,*

—v.—

GEORGIA, *Respondent.*

No. 69-5031

BRANCH, *Petitioner,*

—v.—

TEXAS, *Respondent.*

MOTION FOR LEAVE TO FILE BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

It is hereby respectfully moved pursuant to Rule 42 the Rules of this Court that the above named *amic curiae* be granted leave to file the accompanying brief support of the Petitioners.

Consent to such filing has been requested and had be granted on behalf of the Petitioners Aikens, Furman, a Jackson, and for the Respondent State of Californi Counsel for Petitioner Branch has indicated that he w not oppose *Amicus's* motion, but he declined to provi his consent prior to review of *Amicus's* brief. Conse has been refused by Respondents, State of Georgia a State of Texas. (Copies of the page proofs of this bri were sent by first class mail to the counsel for each R spondent on August 27, 1971, the date the Petitioner briefs were filed.)

The interest of the *amicus curiae* as stated in the accom panying memorandum is as follows:

The American Civil Liberties Union, with affiliates i most states, including California, Georgia and Texas, i a private, non-partisan organization, consisting of 160,00 members, which is engaged exclusively in defense of th Bill of Rights. The Eighth Amendment to the Constitutio prohibits the infliction of "cruel and unusual punishments." We believe that execution for crime is a "cruel and unusua punishment." As an organization, we seek elimination o capital punishment throughout the United States. In thi sense, the *amicus curiae* has a wider stake in the issue presented in these cases than do the Petitioners. In the accompanying brief and appendixes, the *amicus curiae* ha marshalled the best historic and social scientific evidence

[1] These letters of consent have been filed with the Clerk. Both sides have consented to *amicus curiae's* filing of a brief in the *Aikens* case.

bearing on the wider issue of the overall "cruel and unusual" character of capital punishment, thereby providing for the Court the wider context within which these cases should be considered.

Respectfully submitted,

GERALD H. GOTTLIEB
210 W. 7th Street
Los Angeles, California 90010

MELVIN L. WULF
SANFORD JAY ROSEN
American Civil Liberties
Union Foundation
156 Fifth Avenue
New York, New York 10010

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of Amicus

The American Civil Liberties Union, with affiliates in most states, including California, Georgia and Texas, is a private, non-partisan organization, consisting of 160,000 members, which is engaged exclusively in defense of the Bill of Rights. The Eighth Amendment to the Constitution prohibits the infliction of "cruel and unusual punishments." We believe that execution for crime is a "cruel and unusual punishment" and for that reason file this brief to present argument in support of that principle.

Summary of Argument

Three paths of reasoning lead to the same conclusion: the death penalty is unconstitutional under the Eighth Amendment prohibition of cruel and unusual punishments.

I. The cruel and unusual punishments clause requires that all penal sanctions which are cruel, albeit not so severe as to be torture, be rationally related to a legitimate state objective in the administration of the penal law. If the petitioners show that the death penalty is cruel and that there is no basis in human reason to believe that the death penalty serves a permissible objective of punishment, then capital punishment must be held unconstitutional.

II. The cruel and unusual punishments clause is a fundamental protection of individual rights. The widespread disenfranchisement and extreme isolation of prisoners on death rows prevents the condemned man from effectively appealing to majoritarian institutions for enforcement of his constitutional

rights. It is the Court's duty to exercise the most rigid scrutiny in this case.

A. The death penalty, clearly suspect under the Eighth Amendment, is unnecessary in a society with adequate alternative means of fulfilling the legitimate objectives of the penal law. It is therefore unconstitutional.

B. The death penalty and the necessarily associated experience of death row shocks and devastates the consciences of civilized men. It is therefore unconstitutional.

III. The cruel and unusual punishments clause prohibits the torture of persons convicted of crimes. If the petitioner sustains the burden of proving that the death penalty constitutes torture, capital punishment must be held unconstitutional.

ARGUMENT

Introduction

Amicus notes the policy of this Court scrupulously to avoid overstepping the bounds of its province of constitutional review. Conversely it is recognized that when fundamental rights guaranteed to the people by the Constitution are threatened, this Court forcefully acts to protect the Nation's constituted plan. In the cases before the Court questioning the constitutionality of the death penalty under the "cruel and unusual punishments" clause of the Eighth Amendment, an issue is presented which deserves careful scrutiny. Although the fixing of limits upon penalties for crimes is usually a legislative function, there

have been cases in which this Court and inferior tribunals have declined to give unrestrained deference to legislatures —where matters such as the fundamental protection against cruel and unusual punishments are threatened.[2]

This Court has not heard or decided the question of the constitutionality of the death penalty under the Eighth Amendment. That question is a narrow one; the wider question of the wisdom of capital punishment is not the focus of this brief.

While narrow, the scope of the constitutional question does not prevent a proper disposition of that question. Any overcurtailment of the scope of the review could render the pointed and economical language of the Eighth "mere surplusage."

Reference is made to the testimony of certain experts in the fields of criminology and sociology,[3] psychiatry,[4] penology,[5] and medicine and other professionals attached to

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[2] *Weems* v. *U. S.*, 217 U.S. 349 (1910) (cadena temporal); *Trop* v. *Dulles*, 356 U.S. 86 (1958) (de-nationalization); *Workman* v. *Commonwealth*, 429 S.W.2d 374 (Ky. 1968) (life applied to juvenile); *State* v. *Evans*, 73 Idaho 50, 245 P.2d 788 (life for lewd conduct); *Cox* v. *State*, 203 Ind. 544, 181 N.E. 469; *State* v. *Ross*, 55 Or. 450, 104 P. 596; *Jordan* v. *Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966) (solitary confinement in inhuman conditions); *State ex rel. Garvey* v. *Whitaker*, 48 La. Ann. 527, 19 So. 457 (1896); *State* v. *Kimbrough*, 212 S.C. 348, 46 S.E.2d 273 (30 yrs. for burglary); *Mickle* v. *Henrichs*, 262 F. 687 (vasectomy).

[3] Thorsten Sellin, Emeritus Professor of Sociology, University of Pennsylvania.

[4] Louis Jolyon West, M.D., Chief of Neuropsychiatry, UCLA Medical Center.

[5] Clinton F. Duffy, former Warden San Quentin Penitentiary

the prison[6] in the case of *People* v. *Thornton,* Superior Court, Los Angeles County, 1967, a collateral proceeding,[7] as well as books and journals.

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[6] Father Edward J. Dingberg, Roman Catholic Chaplain, Byron Eshelman, Protestant Chaplain, William Graves, M.D., physician.

[7] There is precedent for expanding the meaning of "record" beyond its narrowest meaning. In *Lear, Inc.* v. *Adkins,* 395 U.S. 653 (1969), Mr. Justice Harlan for the majority recognized the inadequacy of review by this Court, were it not to encompass what the state supreme court's opinion considered. Adkins submitted evidence of an agreement relating to a patent—which was not in evidence in the trial court—to the California Supreme Court.

> "Lear argues that this original agreement was not submitted in evidence at trial and so should not be considered a part of the record on appeal. The California Supreme Court, however, treated the agreement as an important part of the record before it, 67 Cal.2d at 906, 435 P.2d at 335, and so we are free to refer to it," 23 L. Ed.2d at 615 fn. 1.

In the California Supreme Court opinion in the present case, reference was made to the disposition of the issue of the constitutionality of the death penalty in a prior case before the California Supreme Court, *People* v. *Aiken,* 74 Cal. Rptr. 882 at 889 (1969). The opinion of the California Supreme Court in that prior case, *In re Anderson and Saterfield,* 73 Cal. Rptr. 21, 447 P.2d 117 (1968), makes extensive reference to the brief filed by amicus curiae for that case and to the transcript from the Los Angeles Superior Court case of *People* v. *Thornton* (1967), 73 Cal. Rptr. 21 at 33, 34, 35, which are referred to in this brief. (Admissibility of the social science evidence before the California courts is provided under Cal. Ev. Code Section 452(g)(h) and the official Assembly Committee comment therein.)

A thorough review of the California Supreme Court holding in *People* v. *Aiken,* the case now before this Court, properly includes review of the transcript from *People* v. *Thornton* and the social science issues raised in the amicus brief before the Court in *In re Anderson and Saterfield.*

I.

Cruelty and the Lack of a Rational Basis

A. The Death Penalty and Permissible Objectives of the Penal Law

The cruel and unusual punishments clause requires that all penal sanctions which are cruel, albeit not so severe as to be torture, be rationally related to a legitimate state objective in the administration of the penal law. If the petitioner shows that the death penalty is cruel and that there is no basis in human reason to believe that the death penalty serves a permissible objective of punishment, then capital punishment must be held unconstitutional.

What are the permissible objectives of the penal law? The Roman statesman and lawyer, Seneca, stated them succinctly in theory: "The law in punishing wrong aims at three ends—either that it may correct him whom it punishes, or that his punishment may render other men better, or that, by bad men being put out of the way, the rest may live without fear."[8] Enlightened men have long recognized the cruelty of the motive of revenge. Plato, speaking through Protagoras, observed, "No one punishes those who have been guilty of injustice solely because they have committed injustice, unless indeed he punishes in a brutal and unreasonable manner. When anyone makes use of his reason in inflicting punishment, he punishes not on account of the fault that is past, for no man can bring it about that what has been done may not have been done, but on account of a fault to come, in order that the person punished may not again commit the fault and that his

[8] Quoted in *Commonwealth* v. *Ritter*, 13 D. & C. 285 (1930).

punishment may restrain from similar acts those persons who witness the punishment."[9]

The maturation and implementation of the doctrine occurred in the context of the evils against which it is directed. Penal practices of various societies in history indulged the objective of revenge; tortures such as the rack, pillory, and thumbscrew existed until the recent past. Revenge through torture reached its zenith in England during the Stuart reign, and was perfected in burnings at the stake, breaking on the wheel, boiling in oil, drawing and quartering, and other ghastly acts. The English Bill of Rights of 1689 was a response to the atrocities;[10] therein the phrase "cruel and unusual punishments" first appeared. The same phrase in the Eighth Amendment to the Constitution apparently was an adoption from the English Declaration;[11] the wording is exact.

The debate in the Congress upon the proposed amendment included the objection of Mr. Livermore and foreshadowed the present case that comes nearly two centuries later. Said Mr. Livermore to his Congressional colleagues at work on the Eighth Amendment:

> "It is sometimes necessary to hang a man, villains often deserve whipping and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel?" Cong. Reg. 225 (1791)

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[9] *Ibid.*

[10] 1 W. & M. 2, c. 2 S 10; see *Weems* v. *United States*, 217 U.S. 349 (1910), and the dissenting opinion at 395-400; cf. 2 J. Story, Commentaries on the Constitution 623 (1873).

[11] *Ibid.*

It was in the face of this objection that the Congress, an the states, passed and ratified the Eighth Amendment.[12]

Some courts and commentators have maintained that i was aimed solely at the practices of the Stuart regime i England.[13] This ignores what this Court said in *Weem* after noting the Livermore colloquy:

> "Legislation . . . should not, therefore, be necessarily confined to the form that evil had theretofore taken Time works changes, brings into existence new con ditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth." *Weems* v. *United States,* 217 U.S 349 (1910).

A half-century later, this Court said: "The words of th [Eighth] amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society . . . " *Trop* v. *Dulles,* 356 U.S. 86 (1958).

In both the English and American bills of rights, th cruel and unusual punishments clause is inextricably asso ciated with clauses prohibiting excessive fines and excessiv bails.[14] A punishment that is excessively severe is one tha

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[12] *Weems* v. *U. S.,* 217 U.S. 349, 369 (1910).

[13] *In re Kemmler,* 136 U.S. 436, 446-447 (1890).

[14] "But it is safe to assume that punishments of torture, such a those mentioned by the commentators referred to [Cooley Const. Lim. 4th Ed. 408; Wharton, Cr. L. 7th Ed. §3405] an all others in the same line of unnecessary cruelty, are forbid den . . . " by the Eighth Amendment, *Wilkerson* v. *Utah,* 9 U.S. 130, 136.

"Torture is defined to be torment, judicially inflicted; pain b which guilt is punished or confession extorted; anguish; e

imposes retribution. The historical anod textual context of the Eighth Amendment as well as the Congressional intent as exemplified by Mr. Livermore's contention, are all incorporated in the interpretation of the amendment that sees revenge as an impermissible objective of punishment.

Leading modern state courts agree that revenge is not a proper function or objective of state power.[15] The Supreme Court of California has held that lighter punishment prescribed by the legislature subsequent to the criminal act but before final judgment should prevail as against the heavier, previously prescribed punishment, *In re Estrada,* 63 Cal. 2d 740, 745 (1965) and in explanation quoted from the similar New York case of *People* v. *Oliver,* 1 N.Y.2d 152, 134 N.E.2d 197, 201 (1956), where Judge Fuld said:

> "According to the best modern theories concerning the functions of punishment in criminal law, the punishment or treatment of criminal offenders is directed toward one or more of three ends: (1) to discourage and act as a deterrant upon future criminal activity, (2) to confine the offender so that he may not harm society, and (3) to correct and rehabilitate the offender. There is no place in the scheme for punishment for its

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treme pain; anguish of body or mind", *State* v. *Pugh,* 15 Mo. 509 (1851).

"Torture is the act or process of inflicting pain, especially as a punishment or in order to extort confession or in revenge", *People* v. *Heslen,* 163 P.2d 21 (1945).

[15] See also: *Rudolph* v. *Alabama,* 375 U.S. 889 (dissenting opinion of Justice Goldberg), *In re Smigelski,* 30 N.Y. 513, 154 A.2d 1 (1959); *People* v. *Ketchel,* 59 Cal.2d 50; Holmes, The Common Law 42, 46; M. R. Cohen, Law and the Social Order 310; Michael and Wechsler on Criminal Law and Its Administration 6 (1940); 55 Col. L. Rev. 1039, 1052; 34 So. Cal. L. Rev. 286; 36 N.Y.U. L. Rev. 110, 117; 31 N.Y.U. L. Rev. 1378, 1381.

own sake, the product simply of vengeance or retribution."

Mr. Justice Brennan, concurring in *Trop* v. *Dulles*, 356 U.S. 86, expressed similar sentiments.

B. The Death Penalty Is Unrelated to Permissible Objectives.

Having established the permissible objectives of punishment in the context of the Eighth Amendment, the question then is whether the death penalty is rationally connected to one or more of those objectives, namely, deterrence of future crime, isolation of dangerous individuals from society, or rehabilitation of criminal personalities.

It is obvious that death can in no way rehabilitate.

While death does "isolate" a dangerous individual from doing further harm, it is manifest that imprisonment for life accomplishes the same end equally well.[16] Life imprisonment affords an opportunity to rehabilitate. It does not entail irretrievable decisions as to guilt as does the death penalty. Life imprisonment avoids presenting physical violence of the state as an official example.

There is no evidence that the death penalty offers any additional deterrence over and above imprisonment. This is made clear in the testimony of the criminologists and psychiatrists who testified in the *Thornton* trial (Appendix A) and in the fact brief on the subject of deterrence (Appendix D) which reviews the published works of the major authorities on that subject in the United States.

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[16] Ramsey Clark: "Modern penology with all its correctional rehabilitation skills affords greater protection to society than the death penalty which is inconsistent with its goals." Speech, July, 1965.

Briefly, the uncontroverted evidence—largely statistical—shows that no lowering of the criminal homicide rate occurs in those states in which the death penalty is a punishment for murder as compared to those States which do not provide the death penalty;[17] there is no evidence of greater incidence of criminal homicides committed on police or prison guards in States that have abolished the death penalty as compared to States that have retained it;[18] comparisons between neighboring states with similar cultural and ethnic characteristics show no significant difference in criminal homicide rates resulting from one of the states retaining capital punishment and the other state having abolished it;[19] in states which have abolished and then restored, or restored and then abolished capital punishment, no significant change has occurred in the criminal homicide rate, and similar findings have been reported for entire nations;[20] increases in homicide rates are associated with the days immediately following well-publicized acts of violence, including executions;[21] and reduction of the rate of criminal homicides depends on factors other than the presence of the death penalty.[22]

"[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by a showing to the court that those facts have ceased to exist."

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[17] See Appendix D, pp. 73a-74a.

[18] See Appendix D, pp. 79a-83a.

[19] See Appendix D, p. 78a; Appendix A, Testimony of Thorsten Sellin, *People* v. *Thornton*, 9a-10a.

[20] See Appendix D, pp. 74a-76a.

[21] See Appendix D, pp. 86a-89a.

[22] See Appendix D, pp. 72a-86a.

U. S. v. *Carolene Products Co.*, 304 U.S. 144 (1938); see also *Brown* v. *Board of Education*, 347 U.S. 483, 489 f.4, 494 f.11. (1954). In view of this contemporary uncontroverted evidence, it is emphasized that no state of facts, either known or which could reasonably be assumed, affords support for the proposition that the death penalty is a deterrent to the kinds of crimes for which it is the punishment, as opposed to imprisonment. Clearly, then, the death penalty does not serve the objectives of rehabilitation, isolation or deterrence.[23]

C. The Contemporary Context of Judicial Review of Death Penalty Statutes: New Developments

The death penalty has been referred to by this Court—in occasional *dicta*—as constitutionally permissible. (We stress that no decision has been made under the Eighth

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[23] Thorsten Sellin, eminent sociologist and penologist and foremost authority in his field on the issue of deterrence and the death penalty:

> "I have attempted to show that, as now used, capital punishment performs none of the utilitarian functions claimed by its supporters, nor can it ever be made to serve such functions. It is an archaic custom of primitive origin that has disappeared in most civilized countries and is withering away in the rest.
>
> "If an intelligent visitor from some other planet were to stray to North America, he would observe, here and there and very rarely, a small group of persons assembled in a secluded room who, as representatives of an all-powerful sovereign state, were solemnly participating in deliberately and artfully taking the life of a human being. Ignorant of our customs, he might conclude that he was witnessing a sacred rite somehow suggesting a human sacrifice. And seeing our great universities and scientific laboratories, our mental hospitals and clinics, our many charitable institutions, and the multitude of churches dedicated to the worship of an executed Saviour, he might well wonder about the strange and paradoxical workings of the human mind." Sellin, *Capital Punishment* (1967), p. 253.

Amendment.)[24] What, within the court's competence, is different now from when these comments were made and from when the Eighth Amendment was ratified?[25]

First, at the time of ratification of the Bill of Rights, the penal system in America was poorly developed.[26] Of the legitimate ends of penal administration, the objective of isolation of dangerous individuals from society could only be effectively furthered by the execution of dangerous individuals. At common law, all felonies were punishable by death (probably in part for this reason) and in the United States at the time of ratification, numerous crimes were still punishable by death. Since ratification, our penal system has developed into a reliable institution, effective in removing dangerous individuals from society.

Second, reliable empirical information about the death penalty in terms of its cruelty,[27] its actual effect as a

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[24] *Trop* v. *Dulles*, 356 U.S. 86; *State ex rel. Francis* v. *Resweber*, 329 U.S. 459; *In re Kemmler*, 136 U.S. 436.

[25] The most obvious new development, of course, is the 1962 holding of this Court in *Robinson* v. *California*, 370 U.S. 660, that for the first time made the Eighth Amendment's commands applicable to the States.

[26] See Appendix B, pp. 59a-65a, a short history of prisons.

[27] Testimony of Dr. Louis Jolyon West, *People* v. *Thornton*, reproduced in Appendix A *infra*, pp. 40a-41a, is cogent here:

"Q. Have you had occasion to consider the relationship between physical and mental pain, that is, between the impact of stress on the body as such and that of stress, fear, the expectation of death, the anxieties involved on the other—have studies been made that would shed light on the relationship between these two phenomena? And if so, are you familiar with these studies? A. Yes, I am familiar with those studies. I have carried out such studies myself. It is possible to measure the degrees of intensity of physical pain through the use of objective instrumentation. The Hardy-Wolff-Goddell ap-

paratus for measuring the intensity of noxious stimulation and the subjective responses to it, make it possible to define approximately 21 increments of discernible change and pain experience. These have been put together into a scale, a so-called Dol Scale, which has ten and a half points, each containing two increments. When you reach ten and a half Dols of painful stimulus, it can't hurt any more than that; that's the maximum amount of pain a person can feel, and increasing the amount of painful stimulation, whether it be burning or pressure on the bone and so on, does not produce an additional degree of pain. It has been my experience that certain individuals who are actually subjected to torture, knowing about this and having been engaged in such experiences, as in a laboratory—I am thinking now here of certain physicians who were trained with Dr. Wolff and then who were subsequently captured, first by the Japanese and later in Korea, and subjected to some very painful stimulation, found comfort in the knowledge that things could only hurt so much. Biologically there was a limit, and they knew what that limit was and were able to endure.

Whereas in the psychological sphere, the type of anguish that comes from knowledge that there are others in whose hands we are helpless, who will when the time comes destroy us, doesn't seem to have any limit; there is no way to measure it; and I would regard such torture as more severe than anything that could be inflicted by thumb screws, racks, or pain machines of the kind we use in the laboratory.

Q. To what extent, Doctor, in your professional opinion, can the application of the mental stress, the mental pain that you have mentioned, be a factor in causing insanity? A. Well, I believe that it can be causative of mental illness either temporarily or permanently, and that this indeed takes place in Death Row types of situations all the time. That doesn't mean in all cases, but that it is going on all the time, as long as you've got a Death Row . . ."

Chaplain Byron E. Eshelman, Supervising Chaplain at San Quentin Prison, 1951-present, describes the execution of Leandress Riley:

"A guard unlocked his cell. He gripped the bars with both hands and began a long shrieking cry. It was a bone chilling, wordless cry. The guards grabbed him, wrested him violently away from the bars. The old shirt and trousers were stripped off. His flailing arms and legs were forced into the new white shirt and fresh blue denims. The guards needed all their strength to hold him while the doctor taped the stethoscope in place. The deep-throated cry, alternating with moaning and shrieking, continued. Leandress had to be carried to the gas chamber, fighting, writhing all the way." Eshelman, *Death Row Chaplain* 160, Prentice 1962.

deterrent,[28] and its side effects on the society,[29] was virtually non-existent in the last century. As the sciences of criminology, penology, psychology, psychiatry, and sociology have developed increasingly reliable indices of human behavior, social scientists have turned their attention to the institution of capital punishment and its effects upon the convict and his society. What they have illumined is an evil so monstrous in its effects on the convict and society that Arthur Koestler has said that whether one approves of capital punishment is the "test of one's humanity . . . ."[30]

Third, very recent developments in the protection of individual rights of the accused and increased safeguards from executions by mistake have enlarged the right of appeals and necessarily extended the time between sentencing and death. The mental torture of death row is an inseparable part of the death penalty today.[31] Earlier decision-making by courts has not had the institution of death row and its implications to consider.

Fourth, as noted in the Introduction, *supra*, the concept of judicial notice has expanded so that evidence of social sciences is now within the scope of a court's scrutiny.[32]

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[28] See Appendices A and D.

[29] See Appendix D, pp. 86a-92a.

[30] *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968).

[31] "But the chief and worst pain may not be in the bodily suffering but in one's knowing for certain that in an hour, and then in ten minutes, and then in half a minute, and then now, at the very moment, the soul will leave the body and that one will cease to be a man and that that's bound to happen; the worst part of it is that it's certain. . . . To kill for murder is a punishment incomparably worse than the crime itself." Dostoevsky, *The Idiot* 19. See also Appendix C.

[32] See note 7, *supra*.

Fifth, in line with developing information now available through the social and psychiatric sciences, courts have been giving increasing attention to mental suffering as a cruelty in and of itself.[53] Simultaneously, the proliferation of lengthy waits on death row have created extreme mental problems in prisoners awaiting execution or reprieve.

Because of the requirement that the condemned be legally sane at the time of his execution, it is not uncommon for inmates of the row to be removed for psychiatric treatment (including extensive electric shock therapy) to restore them to their senses for their execution (an indication of the intention of the State to prevent the condemned, if possible from escaping into insanity).[54] Here, then, is "something more than the mere extinguishment of life."[55] The mental anguish and suffering inflicted on a convict waiting for his death are as much a part of the death penalty as the execution itself.

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[53] *Trop* v. *Dulles*, 356 U.S. 86 (1958):

"Since *Chambers* v. *Florida*, 309 U.S. 227, 84 L. Ed. 716, 60 S. Ct. 472, this court has recognized that coercion (of confessions) can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and thumbscrew can be matched, given the proper subject, by more sophisticated modes of persuasion." *Blackburn* v. *Alabama*, 361 U.S. 199 (1960).

[54] There have been persons on Death Row who needed psychiatric treatment and who were removed from Death Row to the hospital for psychiatric treatment, including electric shock, to remove borderline mental illness so that they could be returned to Death Row so that they would know what was happening to [them] when [they were] being executed. Approximately two dozen men have been so treated. The prisoner must know the crime he committed for which he is sentenced to execution. Summary of Testimony, Dr. Schmidt, San Quentin Prison State Psychiatrist, in *People* v. *Thornton*, R.T. 394, 396-397, 400.

[55] *In re Kemmler*, 136 U.S. 436 (Dictum):

"A good many of these doomed men end up in the hands of the psychiatrist. The strain of existence on Death Row

D. Irrationality and Unconstitutionality

The death penalty, *arguendo*, may have been legitimate in times past, when alternative means of isolation were unavailable or unreliable, when ideas of its deterrent effect were based solely upon intuition in the absence of any sociological evidence whatsoever, when judges were unable to base decisions on social sciences, when execution was

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is very likely to produce behavioral aberrations ranging from malingering to acute psychotic breaks. In most states the warden will transfer such a person to the psychiatric unit of the prison or the security area of a mental hospital. Here the prisoner is not unlikely to pass the rest of his days as a member of that vaguely defined population, 'the criminally insane.'"

West, *Scientific Reflections on the Death Penalty*, Center for the Study of Democratic Institutions, Santa Barbara, California, 1967.

Warden Clinton T. Duffy, San Quentin Prison 1940-1951:

"Once in a while, under the pressure of a tremendous fear, a condemned man loses his mind before execution time. The California law holds that no man can be put to death unless he knows why his life is being taken and understands the difference between right and wrong. In short, he must be legally sane. There is a grim irony in this stipulation, because during those last dreadful hours of suspense the responsibility for gauging a man's mind and his thoughts lies with me. How can I know when a man is insane? Is he insane because he will not eat or sleep or because he talks hysterically? Is he insane because he behaves strangely in the face of death? I don't know." Duffy, Warden Clinton T., *The San Quentin Story* 81 (1951).

Joseph D., Lohman, Dean of the School of Criminology, University of California, 1961-1970:

"When sheriff of Cook County (Chicago), Illinois, I had occasion to observe the day-to-day life of inmates on Death Row. I visited the Death Row at the Cook County jail sometimes daily, never less than once or twice a week. I observed evidence of anguish on the part of inmates of Death Row, as well as evidence of mental illness. I was advised of attempted suicides, and we kept a constant twenty-four-hour guard on

swift, sparing the condemned the anomie of death row, when our knowledge of the human psyche and its infinite capacity for mental anguish was primitive.[36] Perhaps in an earlier century there was a basis in human reason for a legislature to believe that the death penalty served the legitimate penal ends of isolation and deterrence without unnecessary cruelty. But times have changed, and such cannot be said today.[37] The death penalty is cruel in view of such factors as the physical and mental anguish of 1,000 days on death row and the execution transaction, and serves only the illegitimate penal objective of revenge or recrimination. It ought therefore to be held unconstitutional.

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duty with a view to avoiding that eventuality. There was a disposition toward suicide by some of the inmates.

I observed changes in the mental condition of inmates on Death Row. Some of those changes were physical deterioration of the men, rejection of food, withdrawal of the man, plaintive and almost childlike pleas, progressing and developing as execution date approached; the complete disintegration of the personality of the individual.

The sequence of events started with an unbelief that this could have happened to them and that some agency would intervene to upset the whole procedure, desperate, plaintive pleas for help, development of psychosomatic or psychological care and administration which attained a more frequent and finally the complete withdrawal of the individual, quite often huddling in a corner, unable to locomote even about the cell in many cases." Summary of Testimony, Dean Lohman, in *People* v. *Thornton*, R.T. 583, 585.

[36] See fn. 27, *supra*.

[37] Some legislatures have abolished the death penalty only to reinstitute it at a later date. Frequently, the re-institution of capital punishment is provoked by a notorious and heinous crime, and is legislated with dismaying swiftness. In Delaware, for example, the cruel beating and murder of an 89 year old woman in 1961 led to a bill which re-instituted the death penalty. State Senator James H. Snowden of Wilmington declared it to be "panic legislation" that was motivated by emotion and revenge, but the bill passed nevertheless over the veto of Governor Elbert

II.

Cruelty in Context

THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE IS A FUNDAMENTAL PROTECTION OF INDIVIDUAL RIGHTS. THE WIDESPREAD DISENFRANCHISEMENT AND EXTREME ISOLATION OF PRISONERS ON DEATH ROWS PREVENTS THE CONDEMNED MAN FROM EFFECTIVELY APPEALING TO MAJORITARIAN INSTITUTIONS FOR ENFORCEMENT OF HIS CONSTITUTIONAL RIGHTS. SCRUTINY IS THEREFORE REQUIRED, GUIDED BY THE FOLLOWING:

A. THE DEATH PENALTY, CLEARLY SUSPECT UNDER THE EIGHTH AMENDMENT, IS UNNECESSARY IN A SOCIETY WITH ADEQUATE ALTERNATIVE MEANS OF FULFILLING THE LEGITIMATE OBJECTIVES OF THE PENAL LAW. IT IS THEREFORE UNCONSTITUTIONAL.

B. THE DEATH PENALTY AND THE NECESSARILY ASSOCIATED EXPERIENCE OF DEATH ROW SHOCKS AND DEVASTATES THE CONSCIENCES OF CIVILIZED MEN. IT IS THEREFORE UNCONSTITUTIONAL.

N. Carvel. In returning the bill to the legislature, Governor Carvel remarked, "The lack of useful purpose of the death penalty has been the basis for the almost universal condemnation of its use by the church bodies in the United States and throughout the world upon the ground that revenge and brutality can have no place in a morally oriented society and that society can be protected by other means than the taking of a human life . . . The function of the criminal law is to protect the law-abiding and not to fulfill a lust for revenge. Anything that tends to associate the law with the idea of vengeance impairs its dignity and subtracts from the aspect that intelligent people accord it." In Herbert L. Cobin, "Abolition and Restoration of the Death Penalty in Delaware", *The Death Penalty in America*, ed. Hugo Bedau (Chicago, 1964) pp. 366-371.

A. Fundamental Protection

The Eighth Amendment occupies a fundamental place in the American system as a protection of individual liberties against the evils of unlimited government. The rule of civilized law requires limits upon government and the Eighth Amendment is one of them. The cruel and unusual punishments clause has been a fundamental guarantee of the Anglo-American legal system since 1689 and, as such, deserves nothing less than vigorous enforcement.

In 1904, the Court had held that only the most fundamental provisions of the American Bill of Rights applied to an unincorporated territory. *Dorr* v. *United States,* 195 U.S. 138. Six years later in *Weems,* the Court applied the cruel and unusual punishment principle to the unincorporated Philippine territory, considering the provision to be "essential to the rule at law and the maintenance of individual freedom," 217 U.S. 349, 367.

Thus, the Eighth Amendment is a fundamental protection of individual rights, now embraced by the Fourteenth Amendment, and effective upon State as well as territorial governments, and, "essential . . . to individual freedom."

B. Cruelty

The death penalty is substantially different from all other penalties commonly imposed upon criminals. Its uniqueness is partly in its inherent destructiveness of the high objective of criminal sanctions—rehabilitation. The 1,000 or more days of tension, anxiety, and mental torture on death row constitute an experience inseparable from the execution itself.

Dr. Louis Jolyon West, an eminent psychiatrist, has testified as to the mental torture of the death row ex-

perience.[38] After testifying that mental pain has no limit within the knowledge of his discipline whereas there is a definite and scientifically measurable limit to physical pain,[39] Dr. West compared the two:

> "Q. Does that mean that any conclusion can be drawn as to the comparative relationship between that physical pain which might be induced by physical torture and, on the other hand, a mental pain which might be induced by the pendency of death, one or the other? A. What it suggests is that ultimately at least the degree of suffering involved in mental pain is capable of being greater in terms of human experience than that involved in this kind of physical torture . . . ."[40]

Dr. West also testified to the comparative anguish induced by the loss of citizenship and the death row experience:

> "Q. The case cited in 1959 by the United States Supreme Court, of *Trop* v. *Dulles*, and in which the punishment was the creation of statelessness, deprivation of citizenship, to which the court said the punishment was illegal because, among others, trying to subject an individual to an ever increasing amount of fear and distress, and now can you compare, Doctor, based upon your understanding, your experience, your

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[38] The complete testimony of Dr. West is reproduced as Appendix A, pp. 31a-65a. Dr. West was professor and head of the Department of psychiatry, Neurology and Behavioral Sciences, University of Oklahoma School of Medicine.

[39] See footnote 27, *supra;* Appendix A, pp. 40a-42a.

[40] Testimony of Dr. West, *People* v. *Thorton*, Superior Court, Los Angeles, reproduced in Appendix A, p. 42a.

clinical evaluations and your readings, is this kind of degradation of fear and distress imposed upon a Death Row inmate, how is it as compared to that imposed in this case of this kind that I have described? A. I would regard it as substantially greater; in other words, while depriving the person of his citizenship suggests a terrible loss of support by the parent society, the Death Row situation employs not only loss of support but the ultimate threat by the parent society, namely that of destruction. There are many reasons based upon research and human development that I believe this is the most severe stress that is possible for a human being to experience." [41]

The former Warden of San Quentin Prison (1940-1951), Clinton T. Duffy, unequivocally condemned the death penalty.[42] Duffy said,

"In connection with my prison work at San Quentin, I have observed 150 executions . . . I would say in my experience the average time an inmate spends on death row is about three years . . . I have a definite opinion that the procedures and practices resulting in the execution of persons in California is cruel. I have always felt it . . . The inmates are undergoing the tension of naturally they are going to undergo execution (sic), and they have to be under custody at all times during this pending execution, the thought that they are going to be executed and the date is arriving, getting closer and closer, and the fears and the concern

[41] Testimony of Dr. West, *People* v. *Thornton*, Superior Court, Los Angeles, Appendix A, pp. 42a-43a.

[42] Testimony of Warden Duffy, *People* v. *Thornton*, R.T. 4, 8.

and the emotions they are building up are real cruel. I have known them on death row to become so involved emotionally that they have committed suicide . . ."[43]

Chaplain Byron E. Eshelman, supervising chaplain at San Quentin Prison since 1951, describes the execution of the last man to die on San Quentin's Death Row:

"We have had other situations of rather violent resistance and one of the most recent executions which we had, which was April 12 of this year [1967] and this was in the execution of Aaron Mitchell, there were violent aspects to his resistance and while not as violent as in Mr. Riley, but this again to me was a cruel and highly disturbing episode.

This man developed a bizarre behavior in the last hours of his life and he took off all his clothes and he cut his arm with razor blades and when I came down to the holding cell to administer to him, as I was the Chaplain of record, and it was my responsibility to administer to this man at the last, he was standing naked at the end of his cell and in a crucifix form with his hands out to the side and his feet together and this blood was dripping down his arm and I said to him, 'Aaron, do you know me?' He said, 'You are not Jesus,' and I said, 'No, I am not Jesus,' and I told him who I was and at this second he took his right hand and wiped the blood on his left arm and he said, 'This is the blood of Jesus Christ. I am the second coming to save the world from sin,' and he kept that position throughout this time and he was indicating words, but, of course, the doctor told me that during the night he

[43] *Ibid.*

did sit down and he did get a little sleep but the next morning he was back in the same position.

When it came time to dress him he resisted and he said that he didn't want to be bothered. Then he had to be manhandled and put on the wheelchair and we had to wipe the blood off his face and arms and tried to get him to look presentable and then he made a loud shreik, about the worst I ever heard anyone make, and then he fell back on the cot and then began to shreik like in a convulsion but then the officers had to bring him to his feet. He went almost limp and he didn't resist anybody from then on but we had to wait until the Warden gave the signal to bring him in. I walked ahead of him and tried to comfort him and console him and say a prayer but he didn't seem to register, but when they strapped him in or put him in, he said, or he cried out, 'I am Jesus Christ,' and the execution proceeded then with this man in this particular state of mind." [44]

The death penalty is cruel and is more than suspect under the Eighth Amendment. Once this is accepted, the burden should be upon the state to show that the death penalty is necessary to accomplish a permissible end of state punishments.

C. The Death Penalty Is an Unnecessary Exercise of the Penal Power

This Court has condemned the infliction of unnecessary pain in the execution of the death penalty.[45] The infliction

[44] Summary of Testimony, Chaplain Eshelman, in *People* v. *Thornton*, Los Angeles Superior Court No. 328,445, R.T. 90-92.

[45] *State ex rel. Francis* v. *Resweber*, 347 U.S. 483 (1947).

of the death penalty has never been heard or ruled upon under the Eighth Amendment. As early as 1879, the Court foresaw the feasibility of applying the test of necessity to punishments of torture and like evils:

> "... it is safe to affirm that punishments of torture, such as those mentioned by the commentators referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution, Cooley, Const. Lim. 4th Ed. 408; Wharton, Crim. Law. 7th Ed. 3405," *Wilkerson* v. *Utah*, 99 U.S. 130.

In recent years, several lower courts have employed the test of necessity under the cruel and unusual punishments clause.

> "Does the punishment go beyond what is necessary to achieve the aim of the public intent as expressed by the legislative act? If it exceeds any legitimate penal aim, it is cruel and unusual," *Workman* v. *Commonwealth*, 429 S.W.2d 374 (Ky. 1968).

Judicially noticeable facts show that imprisonment in a modern penal institution accomplishes the end of insulation at least equally well without destroying all hope of rehabilitation, and that there is no evidence to support a contention that the death penalty is a special further deterrent to crime over imprisonment and other penalties.[46]

The adequacy of life imprisonment as a complete alternative to the death penalty was recognized by Beccaria (Cesare Bonesana) as early as 1764. In his famous essay on *Crime and Punishment*, he wrote:

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[46] See Appendixes A and D.

"In order that a punishment be just it should have only the degree of intensity sufficient to keep men from committing crimes. No one today, in contemplating it, would choose total and perpetual loss of his own freedom, no matter how profitable a crime might be. Therefore, the intensity of the punishment of perpetual servitude as a substitute for the death penalty possesses that which suffices to deter any determined soul." [47]

Beccaria's position on capital punishment was not adopted by the political leaders of the Enlightment; and not without reason, for the existence of reliable penal reformatories is a relatively late development in history. The first state prison was opened in Pennsylvania in 1829; the movement did not become widespread until the end of the 19th century.[48] Experimentation and development of efficiency in the maintenance of reformatories took still more time, so that it is only recently that prisons can be considered reliable in protecting society from the most desperate convict.

Modern statistical studies tend to support Beccaria's belief that imprisonment is an adequate alternative to the death penalty.

In terms of the isolation of dangerous individuals, the Pennsylvania Board of Parole Study found in 1968 that of those felons who had previously been incarcerated, murderers are less likely to have had records of escapes or other prison infractions; 90% of murderers with prior

[47] Cesare Beccaria, "On the Death Penalty", from a 1764 Treatise, *Dei Delitti E Delle Pene*, as in: *Capital Punishment*, Thorsten Sellin, Ed. p. 41 (N.Y. 1967).

[48] See Appendix B for a more extensive history of prisons.

incarcerations compared with 79% of non-murderers had no prior record of escapes or other prison infractions.[49] Thus there is no reason to believe that convicted murderers are more prone to escape, create discipline problems, or otherwise deviate from the norm of behavior in a maximum security prison.

Statistical and other sociological studies on the deterrent factor of the death penalty as compared to life imprisonment are abundant and virtually uniform in their conclusion that there is "no positive relationship between homicide rates and the existence or non-existence of the death penalty, executions or no executions and the homicide rates" (Testimony of Dr. Thorsten Sellin, *People* v. *Thornton*, Los Angeles Superior Court R.T. 14-15).[50]

"In general, when the homicide rate in states which authorize the death penalty is compared with the homicide rates in other states, it is found that the former states have homicide rates two to three times as great as the latter," Sutherland and Cressey, *Principles of Criminology* 292 (5th Ed. 1955). Moreover, there is no study which concludes that the death penalty is more effective in deterring capital offenses than imprisonment. See, for example, Schuessler, "The deterrent influence of the Death Penalty," 284 Am. Journ. Pol. and Soc. Sci. 54 (1952); Sellin, Ed., *Capital Punishment* 135, 294 (1967); Gibbs, *Suicide* 517 (1968).[51]

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[49] Reprinted in Cal. Legis. Assembly Comm. on the Admin. of Justice, *Report*, 3-12 (1970).

[50] Reprinted in Cal. Legis. Assembly Comm. on the Admin. of Justice, *Report*, 3-12 (1970).

[51] An extensive discussion of the social science studies on subject of the death penalty with special emphasis on the question of deterrence is presented as Appendix D.

Other comparisons between abolitionist and retentionist states show no significant difference in the rehabilitation success rate of paroled murderers. This is significant because a second conviction for murder carries a certain death sentence in retentionist states. Any deterrent value possessed by the death penalty would be expected to manifest itself more in this kind of study than in any other:

> "In the eight states, cited here only because of the availability of parole data (California, Connecticut, Maryland, Massachusetts, Michigan, Ohio, New York, and Rhode Island), we find that of some 1,158 murderers paroled, six committed another murder and nine others committed a crime of personal violence short of murder or a felony. The record of successes shown by the two abolitionist states (Michigan and Rhode Island) is certainly equal to that of the six states which retain the death penalty. Indeed, of the eight states, California is the only one with several cases where a murderer was released and killed again," Bedau, *The Death Penalty in America* 399 (1967). See also California Legislature Assembly Committee on the Administration of Justice, *Report* 3-12 (1970).

Other studies show that temporary abolition of the death penalty with later re-introduction produces no change in the homicide rates.[51] Studies in abolitionist states show no change in homicide rates before and after the abolition of the death penalty.[52]

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[51] Sellin, ed., *Capital Punishment* 122 (1967).

[52] Sutherland and Cressey, *Principles of Criminology* 295 (6th Ed. 1960); Gibbs, *Suicide* 517.

It may be concluded on the basis of all studies conducted by social scientists on the subject of deterrence by threat of execution that there is no evidence to support the proposition that the death penalty deters the commission of capital offenses any more than does long imprisonment. Any conclusion that deterrence is a function of capital punishment must be based on anecdotes, intuition, emotion, or the mere opinion of police and prosecutors. In an age when such scientific studies are abundant and uncontroverted, it is unreasonable and irrational to consider the death penalty to be a deterrent with the alternative of imprisonment readily available.

In holding that *cadena temporal*, when imposed for the crime of falsifying a public record, was excessive and unconstitutional under the cruel and unusual punishments clause, the Court said:

> "The State thereby loses nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal," *Weems* v. *U.S.*, 217 U.S. at 381.

D. The Death Penalty Shocks the Conscience of Contemporary Civilized Men

Many Courts have interpreted the cruel and unusual punishments clause to mean that those punishments are unconstitutional which "shock the conscience of civilized men," *State* v. *Evans*, 73 Idaho 349, 121 P.2d 326; *Stephens* v. *State*, 73 Okla. Cr. 349, 245 P.2d 788; *State* v. *Ross*, 55 Or. 450, 104 P. 596; *Mickle* v. *Henrichs*, 262 F. 687 (D. Nev.); *Harper* v. *Wall*, 85 F. Supp. 783 (D. N.J.);

Politano v. *Politano*, 146 Misc. 792, 262 N.Y.S. 802; *McDonald* v. *Commonwealth*, 173 Mass. 322, 53 N.E. 874; *State* v. *Kimbrough*, 212 S.C. 348, 46 S.E.2d 273; *Nowling* v. *State*, 151 Fla. 584, 10 So.2d 130; *State ex rel. Garvey* v. *Whitaker*, 48 La. Ann. 527, 19 So. 457; *Williams* v. *Field*, 416 F.2d 483 (9th Cir. 1969); *Jordan* v. *Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966).

The former warden of San Quentin Prison, Clinton T. Duffy, describes his experiences while supervising death row:

> "In connection with my prison work at San Quentin, I have observed 150 executions. I have supervised the execution of 88 men and 2 women. I would say my experience is that the average time an inmate spends on Death Row has been about three years . . .
>
> I hate the death penalty because of its inhumanity. Doomed men rot in a private hell while their cases are being appealed, and they continue to rot after a death date is set. They live in the company of misery, not only their own but their neighbory. They know there are two roads out of Death Row, and that they might well have to take the one which leads to the gas chamber.
>
> One night on death row is too long, and the length of time spent there by the Chessmans and many others constitutes cruelty that defies the imagination. It has always been a source of wonder to me that they didn't all go stark, raving mad.
>
> The men of Death Row live in fear and hopelessness, and their thoughts are never off the glass-walled enclosure that waits for them six floors below. This is

not justice but torture, and no court in the land will delibately sentence a defendant to that.

I hate the death penalty because it is a brutal spectacle. There is nothing good about an execution and no one is satisfied when it is over. Even those who say that justice has been served leave the death house white and shaking and determined never to return." [54]

Dr. William Francis Graves, former Death Row physician at San Quentin, describes the effect of the experience on the inmates:

"Coinciding with the arrival of men on Death Row, there developed a very steady deterioration mentally and physically. I think that in regard particularly of Henry Ford McCracken, who I feel probably was microcephalic to start with. He deteriorated very rapidly during the months that I observed him on Death Row, mentally and physically. Finally, he became impossible to communicate with and on one occasion I found him wallowing in his cell in his own excretum, just babbling, and I transferred him to the prison hospital where, under the direction of Dr. David Schmidt, he was given electric shock therapy and finally after a series of such treatments, he recovered sufficiently so that his execution could be legally arranged; so that he had recovered mentally to the point where he could appreciate the fact that he was being punished and therefore be legally executed." [55]

Byron Eshelman, San Quentin's chaplain, describes the double execution of Pierce and Jordan in 1956:

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[54] Duffy, Clinton T., *88 Men and Two Women*, 254.

[55] Testimony of Dr. Graves, *People* v. *Thornton*, pp. 147, 154-56.

"A few minutes before ten the next morning, Father Dingberg approached Pierce's Holding Cell. The condemned man was covering his face with his hands; the Father thought he was praying, or trying to catch a moment of rest.

Suddenly, Pierce lowered his hands and grinned up at Father Dingberg. Blood was pulsing from his neck. Dr. M. D. Willicut, San Quentin's chief medical officer, and Claude Lansing, a lieutenant of the guards, hurried into the cell. Pierce tried to fight them off, slugging, scratching, and biting. They pinioned his arms, discovered a four-inch gash across the right side of his throat all the way up to the ear.

After a quick conference, Warden Teets ordered the four guards to drag Pierce from the Holding Cell and carry him to the gas chamber. Jordan was supposed to have gone first, as a reward for good behavior, but Pierce couldn't be kept waiting now. He fought all the way down the corridor, screaming:

'Lord, I'm innocent! You know I'm innocent!'

Forty-seven witnesses were gathered outside the gas chamber windows as Robert Pierce was carried inside. Blood was spraying from his neck.

'I'm innocent!' he screamed at the witnesses. 'Don't let me go like this, oh, God!'

Two of the witnesses got sick and had to leave.

While he battled against being strapped into the chair, Pierce alternately cursed, wept and asked for divine blessing. Then, suddenly, he appeared to relax.

A moment later he was hoarsely screaming curses at God, the witnesses, the guards.

Jordan was brought in. He looked down at his crime partner, dying even before the cyanide pellets were dropped. 'It's o.k.,' he said, half to himself.

Pierce kept up his screaming. He threw back his head, twisting to show his mutilated throat to the witnesses. His white shirt was soaked with blood.

The door was firmly shut, the pellets dropped." [56]

San Quentin's Roman Catholic chaplain, Father Dingberg:

"When I use the term 'piecemeal dying' in reference to the men on Death Row, I mean the following:

I would say that a man on condemned row dies, as I observe it, daily, weekly, and certainly if he had been in San Quentin for a protracted period of time, in terms of a loss of his sense of values, a withdrawing within himself to the point where relations would become more and more difficult, all of which, as I saw, was the result of this constant element of lack of privacy, being affected by everything that happened to every other individual on the Row. For example, in the event a man who was with him on the Row were to be told that he was to be executed on a certain day, that man in effect, by identifying would die with him even though perhaps his execution might be months, if not years, away.

Frankly, I believe that when a man finally is taken downstairs and the cyanide pellets were dropped, he already had been executed many, many times over." [57]

The following religious organizations support Father Dingberg and Chaplain Eshelman in their condemnation of

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[56] Testimony of Chaplain Eshelman, *People* v. *Thornton*, pp. 162-63.

[57] Testimony of Father Dingberg, *People* v. *Thornton*, pp. 643, 651.

capital punishment: Lutheran Church in America (1966); American Baptist Convention (1960); Church of the Brethren (1957); Disciples of Christ (1957); Protestant Episcopal Church in the United States (1958); American Ethical Union (1960); Union of American Hebrew Congregations (1959); General Conference of the Methodist Church (1960); American Unitarian Association (1956); Universalist Church of America (1957); Anglican Church of Canada's Executive Council (1958); United Church of Canada (1960); and innumerable state and local church organizations.[88]

Charles Dickens:

> "You have no idea what the hanging of the Mannings really was. The conduct of the people was indescribably frightful, that I felt for a time afterwards almost as if I were living in a city of devils. I feel, at this hour, as if I never could go near the place again. Two points have occurred to me as being good commentary to the objections to my idea. The first is that a terrific uproar was made when the hanging processions were abolished and the ceremony shrunk from Tyburn to the prison door. The second is that, at this time, under the British government in New South Wales, executions take place within the prison walls, with decidedly improved results."[89]

The execution and the experience on Death Row are so well hidden from view that only such persons as Warden

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[88] Filler, "Movements to Abolish the Death Penalty in the United States," cited in Sellin, Ed., *Capital Punishment*, N.Y. 1967.

[89] Dickens, "Letter to M. de Cerjat, December, 1849."

Duffy, Dr. Graves, Father Dingberg, and Chaplain Eshelman have an opportunity to know what capital punishment really entails. Indeed, Warden Duffy has written,

"To enforce the law should be a source of pride and satisfaction. Most men and women charged with these duties are dedicated individuals. Even though they often are grossly underpaid, they're willing to make personal sacrifices for the good of the community. I've heard many an official proudly declare after performing a brave and unselfish act, 'I was glad to do it; it was only my job.'

I've never heard anyone say, 'I was glad to take part in this execution; it was only my job.'

Executions are held behind locked doors in dark, gloomy enclosures before a handful of witnesses, few of whom ever brag about what they have seen. No matter how eager their desire to watch a killer pay the penalty, their steps falter as they approach the execution chamber, their stomachs turn at what they see there, and they can't get away fast enough after the spectacle is over. Except for a few officials, like the warden, the doctor, and the clergyman, the names of people who participate in an execution are never announced. The identity of the executioner is the most jealously protected of all, for this very title makes the flesh creep and the blood run cold. I never knew an executioner who admitted his profession to the outside world, either while he was active or after he retired.

If the death penalty were right and proper, it would be carried out in public places and anyone would be free to watch it. If it were a source of pride instead of shame, the participants would be heroes and the

condemned the villains they were meant to be. Instead it's the other way around. A Caryl Chessman becomes a martyr and his executioner a pariah." [60]

Within this country, there are several dozen death rows. If and when the deaths—nearly 600 human beings are waiting—are inflicted, the knowledge of that event will be injected into the common culture, shared by the nation's people. Inevitably, the wholesale slaughter will be on the American conscience, first to shock, then to dull it; and, if the official slaughter continues, and if history is a guide, there will be a heightened appetite in some. Cruelty generates cruelty, and example is the most efficient teacher.

III.

Upon Proof of Torture

THE BASIC CONCEPT UNDERLYING THE EIGHTH AMENDMENT IS NOTHING LESS THAN THE DIGNITY OF MAN. WHILE THE STATE HAS THE POWER TO PUNISH, THE AMENDMENT STANDS TO ASSURE THAT THIS LIMIT BE EXERCISED WITHIN THE LIMITS OF CIVILIZED STANDARDS, *Trop* v. *Dulles*, 356 U.S. 86, 100 (1958).

THE AMENDMENT MUST DRAW ITS MEANING FROM THE EVOLVING STANDARDS OF DECENCY THAT MARK THE PROGRESS OF A MATURING SOCIETY, *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958).

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[60] Duffy, *88 Men and Two Women*, 20.

II. *The cruel and unusual punishments clause prohibits the torture of persons convicted of crimes. If the petitioner sustains the burden of proving that the death penalty constitutes torture, capital punishment must be held unconstitutional.*

Amicus respectfully urges this Court, in view of the facts nd context of capital punishment, that the institution of ie death penalty be considered in light of *Trop*:

> . . . There may be involved no physical mistreatment nor primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in development. . . . In short, the expatriate has lost the right to have rights. This punishment (denationalization) is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. *Trop* v. *Dulles*, 356 U.S. 86, 101-102 (1958).

ie facts are referred to under Parts I and II, and in the ppendices.

The death penalty, as torture, is necessarily violative of e Eighth Amendment and no contentions of necessity justification can be considered.

Said this Court midway in its history:

"... difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punish-

ments of torture, such as those mentioned by the commentators referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution. Cooley, Const. Lim., 4th Ed. 408, Wharton, Crim. Law, 7th Ed. §3405." *Wilkerson* v. *Utah,* 99 U.S. 130, 136 (1879) (dictum).

CONCLUSION

That the cruel and unusual punishments clause incorporates mental agony and destruction of personality is clear from *Trop* v. *Dulles.* Speaking of the denationalization of a wartime deserter, a punishment which involved no physical pain at all, the Court said,

> "... There may be involved no physical mistreatment nor primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in development ... It subjects the individual to a fate of ever-increasing fear and distress," *Trop* v. *Dulles,* 356 U.S. 86, 101-102 (1958).

Mr. Justice Frankfurter, dissenting in *Trop,* noted that wartime desertion is, and always has been, a capital offense. He posed the rhetorical question, "Is constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death?" 356 U.S. at 125. The plurality opinion had denied the validity of using the death penalty as a measure of constitutional punishments.

> "... It is plain that the existence of the death penalty is not a license to the Government to devise any pun-

ishment short of death within the limit of its imagination." 356 U.S. at 99.

The real meaning of *Trop* v. *Dulles* cannot be understood except in the context of its time. Until death is ruled unconstitutional, courts will be indulging that "constitutional dialectic so empty of reason" of which Mr. Justice Frankfurter complained. Essentially, the plight of justice, shared by the majority and the dissenters in *Trop*, is that whatever progress is to be, under the Eighth, is severely hampered by the survival of this worst of all excesses imposed upon human beings by the modern civilized state.

It is only now that the Court is presented with evidence of the unlimited mental anguish of death rows. The 1,000 or more days of fear and distress, ever increasing with the last efforts at appeal, exceeds the travail of the most sophisticated physical tortures. It cannot be seriously argued that loss of citizenship is a fate worse than the fate of a condemned man on death row. It must be concluded that the death penalty is far worse than the denationalization of a citizen.

Not only the infliction of death, but the entire institution of capital punishment is the subject of this brief. The amicus has invited the Court's attention to the Death Row process itself: the years of uncertain waiting marked by the deaths of row-neighbors, the anguish as other inmates' days of execution approach; cries, self-mutilations, despair, and insanity—all in bleak contrast to the relative freedom of the reformatory yard below.

The meting out of punishment, like every other subject of the Sixth, Seventh and Eighth Amendments, is emphatically the judiciary's business, involving the operation

of the judicial process and the efficacy of the judicial power. The Court may prudently strike the death penalty now when the society has constructed, staffed and supported reformatories, and is served by the techniques of criminology, psychiatry, and education.

During the century between the enactment of the English Declaration of Rights and the American Bill of Rights (1688-1791), men were not aware of the psychology of pain, assuming that the greatest pain was physical. We now know that the anticipation of death is more unbearable.[61]

Respectfully submitted,

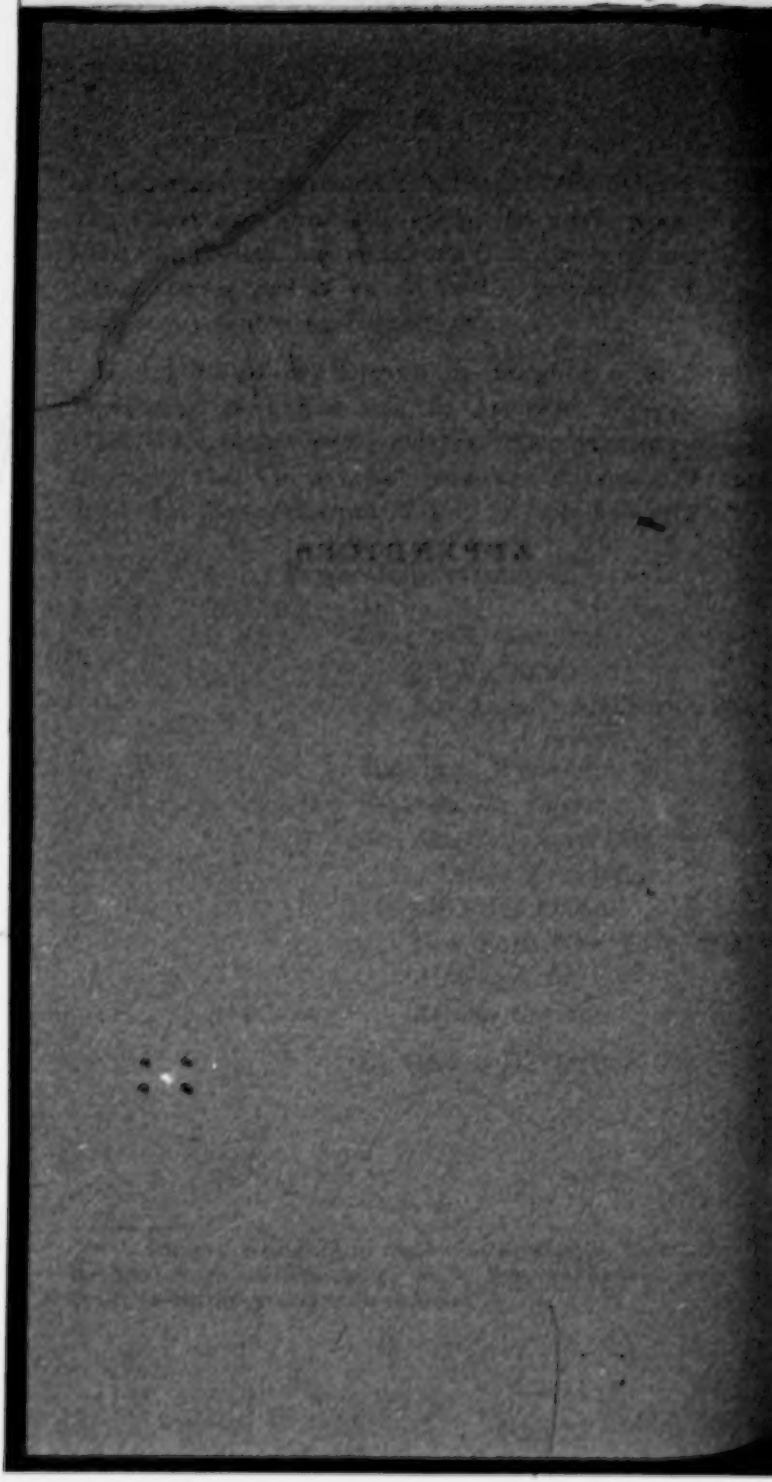
GERALD H. GOTTLIEB
210 W. 7th Street
Los Angeles, California 90014

MELVIN L. WULF
SANFORD JAY ROSEN
American Civil Liberties
Union Foundation
156 Fifth Avenue
New York, New York 10010
Attorneys for
Amicus Curiae

By GERALD H. GOTTLIEB

[61] -- without intending to diminish the anguish that occurs in the final stages of life-taking. As to this, we further invite the Court's attention to Appendices A and C.

APPENDICES



APPENDIX A

Transcript From the Los Angeles Superior Court
Case of *People* v. *Thornton*

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

Department 101 Hon. Herbert V. Walker, Judge

No. 328445

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

ROBERT EMMETT THORNTON,

Defendant.

Reporters' Daily Transcript

Monday, November 6, 1967

Los Angeles, California, Monday, November 6, 1967; 9:30 A.M.

The Court: People vs. Thornton, let the record show the parties and counsel are present.

You may proceed.

Call your next witness.

Mr. Gottlieb: Your Honor, we will call Professor Thorsten Sellin. I might mention, your Honor, that in view of the fact that the State takes the position that the defense to our attack on the death penalty of deterrents is relevant, and not knowing what the final ruling of the Court will be on that matter, and because of the schedule of Pro-

fessor Sellin, we ask that this testimony be taken now, even though it would in effect constitute a portion of any rebuttal case that we may wish to put on. We ask the indulgence of the Court in view of the fact that he will not be available later.

The Court: All right.

Mr. Gottlieb: Thank you, your Honor.

Professor Sellin.

The Clerk: Would you raise your right hand, please.

You do solemnly swear the testimony you are about to give in the cause now pending before this Court shall be the truth, the whole truth, and nothing but the truth, so help you God?

The Witness: I do.

The Clerk: Be seated, please.

State your name, please.

The Witness: Thorsten Sellin.

The Clerk: Spell your last name.

The Witness: S-e-l-l-i-n.

Direct Examination by Mr. Gottlieb:

Q. Professor Sellin, are you presently attached to any academic institution? A. Yes, I am an emeritus professor of the University of Pennsylvania.

Q. In what field is your work? A. I have been teaching criminology since 1926.

Q. And at what places have you taught, Professor Sellin? A. Well, I have taught mostly at the University of Pennsylvania, at Columbia University as a lecturer for ten years; as a visiting professor at Princeton; the University of California at Berkeley; as a lecturer in a great many European universities. In 1959 and 1960 I was a Fulbright lecturer at the University of Cambridge.

Q. Professor, prior to the portion of your life involved with teaching and with holdings of the chairs at the universities, what was your education prior to that time? A. I went to college. I took a master's degree in 1916 at the University of Pennsylvania; I later on studied in part at

the University of Minnesota while I was teaching in Minneapolis; and in 1922 I received a doctorate from the University of Pennsylvania.

Q. In what field, Doctor? A. In the field of sociology.

The Court: May I interrupt just a moment?

(A recess was taken to dispose of another matter.)

The Court: Sorry to interrupt you. Go ahead.
Mr. Gottlieb: Your Honor doesn't mind if I stand?
The Court: No.

By Mr. Gottlieb:

Q. Professor, are you a member of professional and academic societies, honorary societies that you could mention? A. Yes, I am a member of the usual sociological professional societies.

Q. Would you name them? A. The American Sociological Association; I am a member of the American Philosophical Society; I am a member of the International Society of Criminology; the American Society of Criminology. There may be many others but they have no particular bearing on this.

Q. Have you held offices in professional and academic societies? A. Yes, I have from 1956 to 1965. I was president of the International Society of Criminology which had its headquarters in Paris; I am now its honorary president. I am president of the International Penal and Penitentiary Foundation with headquarters in Switzerland.

Q. I didn't hear the full name. A. The International Penal and Penitentiary Foundation. Many years ago I was president of the Eastern Sociological Society, which is the largest branch society of the American Sociological Association.

Q. And may I ask you, if you would, to put modesty aside and refer to any, or to some at least matters of an honorary nature. A. Well, I hold honorary degrees from the University of Uppsala in Sweden and Leiden in Hol-

land as Doctor of Jurisprudence; also from my alma mater, Augustana College in Rock Island, Illinois. I have an honorary membership in Phi Beta Kappa.

Q. Now Professor Sellin, have you published? A. Yes, I have published eight or nine books and some 180 articles.

Q. Broadly referring to the books, in what fields are they written? A. Entirely in the field of criminology and penology.

Q. And the articles? The 180-odd articles? A. They are also in the field, yes.

Q. These articles are they, are some of them published in learned journals? A. Most of them are, yes.

Q. Have you during your career, Professor Sellin, been called to present your findings on sociological questions to public bodies? This is a yes or no at this point. A. Yes.

Q. And those public bodies included parts of foreign governments? A. Yes. I was for one year a consultant to the Penal Code Commission of Sweden.

Q. Sweden? A. Sweden, and in 1950, '51, when I was Secretary General of the International Penal and Penitentiary Commission for a year and a half in Switzerland, the British Commissioner on capital punishment asked me to prepare a brief for the commission. Later on the Canadian Parliament's Joint Committee of Senate and House of Representatives also asked me to prepare some studies for them.

Q. And have you also been called on as a consultant within the United States? A. Yes, I was a member of the Advisory Committee of the American Law Institute that drafted the Youth Correctional Authority Act in the early 1940's; for ten years I was on the advising committee of the American Law Institute to prepare the model penal code. I have also drafted legislation for the National Commissioners of the Uniform State Laws. I have drafted the Uniform Criminal Statistics Act for that particular body, and that is the act that was adopted by California a few years ago.

The Court: May I interrupt you just one moment again?

(There was a brief recess to dispose of another not related matter.)

The Court: You may proceed.

By Mr. Gottlieb:

Q. Dr. Sellin, in the course of your activities in your career—let me go back a bit more on the matter of your education if I may.

Has your education included studies involving that portion of sociology which deals with matters of crime? A. Has my education, you say?

Q. Yes, I am talking about the early formal education. Did this extend in sociology to dealing with matters, with the subject of crime? A. At the time when I got my education it wasn't quite so common to have special courses in criminology. But after I received my degree, my doctorate in 1922, I took two years off, 1924-26, and spent those two years in Europe in the study of criminology, mostly in Paris; a year at the Law School in the Institute of Criminology at the Law School in Paris; and also in Italy and in England.

Q. Was that at Sorbonne? A. I was at the law school, the Institute of Law.

Q. Have your books been used in academic circles? A. Yes, I know they have.

Q. Would you refer to some of the titles of the books, Professor? A. Well, part of them are historical, some are statistical. I prepared a book on the depression and that was back in 1937; in 1938 another book on psychological research, counsel, on conflicts and crime a few years later, a book on the criminality of youth which was published by the American Law Institute that grew out of my work as a consultant for the youth correctional authorities; in 1944 a book, a historical work on origin and history of the Amsterdam Houses of Correction in the 16th and 17th centuries. I called it "Pioneering in Penology". In 1959 the American Law Institute published my book under the death

penalty which grew out of the work that I was doing for the Law Institute on moral codes.

Two years ago I published what they called or what I considered a work on the measurement of delinquency and I have also translated and had published translations of the New Switzerland Penal Code at the Child Welfare Association of Sweden and which was published by the Minister of Justice in Stockholm.

Q. Have you co-authored books with other authors? A. Yes, a few of them. One of them is a book on the Measurement of Delinquency, yes.

Q. Have you had contact with a colleague, Harry Barnes? A. I know him, yes.

Q. Referring back to the studies, and I notice the titles dealing again and again with matters of crime delinquency conflicts, have you had occasion during your career to study and look into the causes of crime? A. I have handled, I have had occasion to study crime and to see what relationship there may be between crime and social and economic conditions, and the problem or cause becomes a very difficult one.

Q. Have you had occasion not only in writing of your own books but to read the works of others on the subject of crime incidence and causation of crime? A. Yes.

Q. More particularly, have you had occasion to read into the factors that are considered by students of the subject to be the major causes of crime? A. Yes, I have.

Q. This also includes crimes of violence? A. Yes.

Q. As a preliminary question, Professor, would you indicate, referring as you will, to such readings and materials as come to mind, what are considered by you students of the field to be the factors that cause crimes of violence and to which crimes of violence are attributable by the men and persons who are learned in the field.

Mr. Busch: Just a minute. I am going to object. I believe it would be irrelevant to this hearing here.

The Court: It will be sustained.

Mr. Gottlieb: Your Honor, this presents a problem in this sense, that if the People's position is that

the question of what constitutes the causal factors in crimes of violence, if this question is deemed by the People to be irrelevent, then I take it we might as well rest with respect to the question of possible deterrents because I had assumed that that is what we were trying to do, but I am not arguing, I am merely reflecting upon the implication of their objection.

The Court: I don't think the area is particularly relevant myself.

Mr. Gottlieb: I am not going into this—I am not going to give a lecture on the burden.

Mr. Busch: I didn't know we had a burden in this case.

The Court: In any event, I will sustain the objection, counsel, and you proceed with your examination of this witness as you see fit.

Mr. Gottlieb: Thank you.

Q. I will speak now in view of the ruling of the Court and, Professor Sellin, what are the dominant causes, as you understand them, of crimes of violence?

Mr. Busch: Same objection, it is not relevant to this hearing.

The Court: It will be sustained.

By Mr. Gottlieb:

Q. Have you had occasion to study the effect of the death penalty in relation to crimes of violence? A. I have had occasion to study it with relation to murder.

Q. And in connection with that study, have you come to —would you state the nature of the studies that you have conducted? A. Well, for the Royal Commission on Capital Punishment, I examined a research that had been done in various countries where the death penalty had been temporarily abandoned and then reinstated, especially some of the German states back in the middle of the last century, and I examined all of the statistical data that I could find in the United States on homicide rates and executions and so

on, in order to make it possible for me to prepare the material for the Royal Commission.

I did the same thing also for the Canadian Commission or Committee and made a special study for the Canadians on the relationship between the death penalty, what I call police safety, in other words, a study to examine to what degree the claim was true that the police was better protected in states that possessed the death penalty.

I have also since that time, I have examined statistics of the homicides committed by prisoners in penal institutions in order to see whether or not the states that have the death penalty offer greater protection to the personnel and the staff and the Federal prisoners than the states that have abolished the death penalty. I think that this study that I made was with the assistance of the State Correctional Departments in all but three or four of the small, smallest states in the United States and in 1965 it is probably the first knowledgeable examination of prison homicides that have been made in the United States.

Q. Without going into statistics, or without going into detail, Professor, would you care, would you care to give us what you concluded from these studies? A. Well, my conclusion has been that I am not able to find any positive relationship between homicide rates and the existence or non-existence of the death penalty executions or no executions and homicide rates.

Q. And have you drawn a conclusion with respect to the safety of guards within prisons in this connection? A. Well, there is no incidence at least on the basis of the findings of this survey that I made in 1965 and prior surveys did not indicate one as extensive, that is in 1964, and there was also a survey made in 1964 and 1965 in the Canadian institutions and Canadian prisons done with the assistance of the Corrections Department in Canada and there is no evidence that prison homicides occurred at any more frequency, everything considered, the population size and so on, than occurred in smaller states and again in the bigger states.

Furthermore, I found that in most of the homicides committed in prisons by prisoners are not committed by persons who are serving sentences for murder but committed by persons serving sentences for robbery and other offenses.

Q. If I understand it right, some of the data or some of the studies that you have made is a comparison within particular states or countries where there has been an elimination temporarily or otherwise of the death penalty as one of the means of comparison? A. Yes, I have insofar as it has been possible to secure data. I have examined what has happened before, during and after abolition. It is not easy to interpret exact data from the last wave of abolition prior to the one going on now that occurred during the first World War and/or prior to the first World War and some of the states abolished it only for a year or two years, not necessarily for the crime of murder but have reinstated it under rather difficult post-war conditions; for instance, wholesale demobilization and in some instances there seems to be a temporary decline in homicide rates and in others an increase, so that there was no evidence that this abolishment had in any way whatsoever anything to do or at any time has had anything to do with the development of these homicide rates.

Q. Professor, in the analysis in the United States of the data, have you applied tests that relate to the problems of significance of variation? A. No, I have not specifically.

Q. Have you in a general sense indicated whether or not on a temporary basis or is there not any statistical significance? A. I have not, no.

Q. The data that you have used has been of a comparison within various states, has it, and it has also involved comparisons between states of the United States? A. Yes, indeed.

Q. Now as to that, would you indicate what states, if you have it in mind, that have been the subject of these comparison studies? A. The early comparisons as a rule, what the students of the problem have done is to compare

states with the death penalty and those that do not have the death penalty in the United States. Those comparisons I regard as illegitimate and improper because abolition states have been in the north; all of the southern states with their special population problems have had the death penalty, so I think it is only fair to make a comparison, to take the death penalty, that is the abolition states and then compare the data from those states with the neighboring states that appear to have the same general cultural development and population problems and so on, so there I made comparisons between Maine, who has no death penalty, Vermont, and New Hampshire that do have, Rhode Island that does not have the death penalty, Massachusetts and Connecticut that do, Michigan that has no death penalty, and Ohio and Indiana next door that do.

Wisconsin and Minnesota who do not have the death penalty compared with Iowa and Illinois. In such comparisons it is impossible to find any differences both as to size and as to trend over the period of years they have followed within each of these culture areas, whether it is east or midwest; they follow the same trend and they are all of them approximately the same size. If I were to present to any reasonable man graphs of these rates for these compared states without mentioning the name of the state, and ask him to select the one that had abolished the death penalty or retained it, I would defy any reasonable person to be able to do that, because they are so similar.

Q. We'll return to that, to those comparisons.

Now beyond the comparison between neighboring, or states within regions as you have indicated, and the comparison that has to do with abolition or the discontinuance by whatever means on the one hand and the continuance of executions on the other, what other comparative data—let me withdraw that question.

What has been your source of data which you indicate as to the various comparative studies that you have made? A. Well, so far as discussions are concerned I relied upon the very excellent and complete statistics that have been

published since 1930, first by the Bureau of the Census, and since 1946 by the Federal Bureau of Prisons, which hold annually the number of executions and the characteristics of those executions and so on. So far as homicide data are concerned, I have relied upon the mortality statistics of the United States Department of Health, Education and Welfare, from their vital statistics, which are statistics of willful homicide as the cause of death. They show a very, very high co-relation with the statistics of willful homicide known to the police and published by the FBI. And these mortality statistics are generally regarded by statisticians today as being a very adequate basis for measurement.

Q. Have you also considered the rates or the numbers of executions in other countries in the course of your studies? A. Well, I have read the material that was published by the British Royal Commission on the situation in England. When it comes to most of the other countries, they haven't had any executions for so long that there is nothing to study, at least not for the last several decades.

Q. To what countries do you refer in the statement that they have not had executions for the last several decades? A. Well, the Belgium and Holland and the Scandinavian countries have not had any executions for several decades. Except immediately after the war for collaborators in some of those countries; but not for murder. The West German constitution, the Italian constitution both eliminate the death penalty since the last war. And of course England has done so recently, for murder. So—even France still retains the death penalty but the rate of executions have been declining very very steadily since the war, since that collaboration period after the war. Now I think only about—there are one or two executions a year in France. There used to be a very high number there annually.

Q. The death penalty is retained in the Soviet Union? A. Yes, it's retained in the Soviet Union, more for certain economic crimes than for crimes against the person.

Q. Now returning to the comparative data you have mentioned, comparing states as mentioned—abolitionist and other states, considering the available data, would it be

possible, Professor Sellin, for a student of criminology to apply the principles of intellectual honesty in his consideration of the data, to reach a conclusion that the death penalty has some additive effect in the deterrence of crimes in those states that practice it? A. No, that would not be possible.

Q. I'd like to refer to the portion of this country in the southern part, the southern states. Are the homicide rates in southern states particularly higher than those for other regions? A. Yes, they are very high, comparatively speaking.

Q. Have any of the southern states extinguished the use of capital punishment? A. Not to my knowledge, unless West Virginia is to be considered a southern state; in that case West Virginia abolished the death penalty two years ago.

Q. Referring to the southern states, do you have in mind —I refer to particular southern states—the general order of homicide rates as compared to those of particular states in the north? A. Well, the lowest homicide rates are in the northeast—states like Maine, New Hampshire and Vermont have homicide rates that compare favorably with the very best of European countries. The rates tend to rise as you proceed toward the midwest and as you proceed southward, so that one might generalize by saying that the farther south you go the more likely you will find a higher homicide rate; and the same thing would be true westward.

Q. Do you have an opinion as to why the farther south you go the higher the homicide rate? A. It's partly a population problem, and partly a cultural problem. The homicide rate is so far as we can judge much higher among the colored population than the white population, which can be deduced in a sense from the fact that it has been found—and that is a generally known fact—that homicide tends to be something that occurs within the family or the cultural group to which one belongs. In other words, Mexicans kill Mexicans and Negroes kill Negroes and whites kill whites and so on. They are acquaintances, drinking companions, members of the family and so on. And we know that 50

percent of the victims of homicide—50 percent is white and 50 percent is colored. Considering therefore the size of the colored population in the United States, the homicide rate is evidently very much higher in that group, and that accounts to some degree for the higher rates in the south, because that is where the colored population is largest.

Q. Is poverty one of these factors? A. Yes, judging from the social and economic status of those who have committed homicides you find that they mostly come from the poorer classes. Whether poverty is the cause or not is another matter.

Mr. Busch: I didn't hear the last part.

The Witness: I say whether poverty is the cause of that or not that is very difficult to say.

By Mr. Gottlieb:

Q. In the course of your career is it a fair statement to say that you have been acquainted with most of those persons who are of eminence in the field of sociology and criminology in this country? A. Yes, I think that's fair to say.

Q. And that you are acquainted with the writings of persons learned in the field of penology and criminology? A. Yes.

Q. And Professor Sellin, among those persons and among those writings is the factor of the existence or non-existence of the institution of capital punishment in a particular state considered to be a significant factor as to the incidence of crimes of violence?

Mr. Busch: Objected to as calling for his conclusion, and hearsay.

Mr. Gottlieb: He's an expert, your Honor.

The Court: For his own opinion, he may consider any facts which are used for that purpose, but when you talk about "all the people of eminence," this gets into the field of hearsay, as I view it.

Mr. Gottlieb: I'm asking—

The Court: You're asking for the opinion of ma
He is capable of giving his own opinion based on
opinion of many, if that is what he is talking abo
I don't know. The objection will be sustained.

By Mr. Gottlieb:

Q. Based upon your studies and your researches and
other considerations that you apply, Professor Sellin,
the existence or non-existence of the institution of capi
punishment a significant factor in the incidence of crimes
violence in these particular states? A. I have found
connection.

Q. And have you in part relied in that answer upon
view of the writings of others? A. I have read a gre
many studies, yes.

The Court: The question, though, Doctor, is d
you rely on what information you got from the su
ject—

Mr. Gottlieb: May I rephrase my question, yo
Honor?

The Court: Your question is all right.

Mr. Gottlieb: Sorry, your Honor.

Q. Did you consider, did you give consideration and r
view the writings of others in connection with these dete
minations? A. Yes, I did that.

Q. And would it be a fair statement to say that yo
reviewed the writings and communicated with those
eminence in the field? A. I read a great many studies
murder and crime in general and so on, some of them b
very eminent scholars and some of them by very, ver
modest ones. There have been a great many of them, an
way.

Q. Professor Sellin, do you have at hand any table
any tabulations on these comparative studies? A. I hav
some—I didn't bring tables. I have some tabular materi
that I could present, yes, that is in text form, but n
specific tables. I have that report on executions. I hav

certain diagrams; I spoke about the diagrams, about the movement of the death penalty in the United States and the statistics involved.

Q. The particular section of the book that the Professor has handed me, "Capital Punishment, Thorsten Sellin, Editor," and this is an article in that work titled: "Homicides in Retentionist and Abolitionist States by Thorsten Sellin."

We may introduce this later; in any case, I will show it to counsel.

(Mr. Busch examines and returns the book.)

By Mr. Gottlieb:

Q. Referring then to pages 136 and 137 which are some charts, would you explain what those charts show? A. These are the diagrams to which I referred earlier, which indicate the size and the trend of homicide death rates in contiguous abolitionist and retentionist states from 1920 to 1963, inclusive; and in each of these diagrams there is at least one abolitionist state and the rates of that state are shown in comparison with the rates of contiguous states that have retained the death penalty, and which indicates that the trend from the 1920s appear to be in the same general direction and involve the same general size for each particular group of states, especially within recent years.

Q. Let the record show that Professor Sellin has referred to the table entitled, "Homicide Rates Per 100,000 Population in Contiguous Abolitionist and Retentionist States, 1920 to 1963," with a series of six graphs on those two pages, the first of which is a comparison of Maine, Vermont, and New Hampshire, Maine being an abolitionist state—correct me if I'm wrong, Professor—

The Court: Well, this is only putting in graphical form that to which he has already testified relating to the several states he previously testified to; isn't that correct, Doctor?

The Witness: Yes, your Honor.

The Court: No use repeating it over and o again, if it's there.

By Mr. Gottlieb:

Q. Would you refer, sir, to other data upon which t has been based? A. You mean on these particular d grams?

Q. Yes, beyond this do you have data here on which t charts themselves are based? A. The charts are ba upon the homicide death rates published by the Bureau Vital Statistics for each particular state for the peri covered, and that is all in this particular set of diagra

Mr. Gottlieb: You may examine. No further qu tions.

The Court: We will take the morning recess, D tor.

(Recess.)

The Court: People vs. Thornton. Let the reco show the parties and counsel are present and the D tor has resumed the stand.

You may proceed.

Cross Examination by Mr. Busch:

Q. Doctor Sellin, I am Joseph Busch of the District A torney's office here in Los Angeles County.

Did you make your first comprehensive study with r lation to the death penalty for the Royal Commission Capital Punishment that was in existence in Great Britai that is in the 1950s? A. Yes, by "study" if you mean a direct personal research, yes. I had been teaching crim nology, of course, for many years and in that connection had been reading about capital punishment and so on.

Q. Were you asked to conduct that particular study? A The Royal Commission asked me to provide them wi statistical data. It was a rather general request. T Commission had sent out questionnaires to a great ma

European countries and American states, but the replies to those, the questions referred to statistical data, seemed to be very poor and the Commission felt that they wanted a great deal more information, though, of that nature. Well, it was my own idea to focus on making a determination or focus of that collection of data, just as you would collect statistics, without some kind of focus, so I used that idea as a basis for the collection and the study and the research.

Q. Did you make independent surveys of the effect of the death penalty on homicides at that time other than the statistics that were presented to you? A. Well, my own independent studies at that time was a collection of data on homicide death rates for the various states that was studied in the United States and in those data that was not available in that form before that time. I think I would consider that an independent research.

Q. And the statistical information that you included within your survey tried to delineate, though, types of homicides as compared just to homicide reports generally? A. They were wilful homicides, deaths due to wilful homicides, they were not specifically by degree of homicides. This is the same kind of data that the FBI is now publishing under the name of murder and non-legitimate manslaughter.

Q. Would it have included manslaughter as may be defined by particular states? A. That is correct.

Q. Would it have included wilful killings within particular states that might not have amounted to capital offenses? A. That is correct.

Q. And then it would have included wilful homicides that included capital offenses, is that right? A. That is correct.

Q. And did you endeavor to at any time in your studies try and break down the effect of the death penalty with relation to capital wilful killings? A. I just never found any statistics that showed the amount or number of the capital murders. They don't exist.

Q. That is something that is not available, is that right?

Mr. Leavy: You will have to answer out lo
You nodded your head instead of answering.
The Witness: Oh, I see. Excuse me.
Mr. Leavy: What was your answer?
The Witness: I said, "That is correct." I know
no statistics on capital punishment that include
number of capital murders of both capital kin

By Mr. Busch:

Q. In your studies have you found that in some sta
they have a classification of felony-murder, that doctri
as it applies to particular felonies as being capital crime
A. Yes.

Q. Have you ever been able to find any statistics
that type of capital offense alone? A. I think that with
the last few years the FBI has attempted to segrega
felony-murders from other offenses but this is extreme
difficult to do, as you have to get it through initial statisti
and the general effect is, well, the United States has t
poorest of statistics of any civilized nation.

Q. Have you ever made any studies as to the effect
capital punishment on nonhomicide crimes? A. Not t
effect of capital punishment, but I have attempted a stud
on the effect of an increase in the severity of punishmen
for a particular crime, to see whether or not that had an
effect upon that particular type of crime, in the City o
Philadelphia.

Q. Have you ever made a study of the effect of capita
punishment on the crime commonly called the "little Lind
bergh Law"—the Lindbergh law?

Mr. Gottlieb: Could we have a description, counsel
beyond that appellation?
The Witness: You mean the kidnapping?

By Mr. Busch:

Q. Kidnapping for the purpose of ransom or extortion
or robbery, where injury might occur to the victim? A. I
have never made such a study.

Q. Would it be a fair statement, Dr. Sellin, to state that your studies with relation to capital punishment in homicides has been a comparative one between nations and states that do and do not have capital punishment? A. Yes, I think that would be fair.

Q. Have you ever made a comparative study of California—the State of California—with any other country or state? A. I have not.

Q. Is California included within the tables that you made reference to when Mr. Gottlieb was questioning you? A. It is not.

Q. I take this is the first time you have appeared in California on this issue? A. Not quite.

Q. Have you appeared here before, sir? A. Not in court.

Q. Where have you appeared? A. I was asked once to speak to the—was it the House Judiciary Committee in Sacramento? I forget exactly now.

Q. Do you recall about when that was? A. Oh, a few years ago.

Q. After you had made your report to the Royal Commission on Capital Punishment in the early 1950's, did you see a copy of their findings? A. Yes, indeed.

Q. When you appeared before that Royal Commission, Dr. Sellin, did you indicate to them that your statistics did not support a conclusion that capital punishment had no deterrent effect? A. I forget the wording that was used. What I wanted to convey to them was that I had been unable to find any positive or negative relationship between executions, the death penalty and the homicide rates; that was the general tenor of the conclusion.

Q. Would it be fair to say that you were unable to arrive at an effective conclusion with reference to it? A. I was unable to arrive at a conclusion that the death penalty had any positive effect on homicide rates.

Q. Were you able to arrive at a conclusion that it did not have? A. I was unable to find any relationship between the death penalty and homicide rates.

Q. Have you ever undertaken to determine whether or not the individuals who have not committed a willful homi-

cide were affected by the existence of capital punishment? A. Specific persons? No, of course not. I have not been able to do that. In more local influence rather than these large-scale state studies, we made one back in the 1930's, a study of the effect of executions on Philadelphians in highly publicized cases upon homicidal deaths before and after the executions, and that study was published, it was done by a professor at Oregon State, and it was found that there was no—one couldn't tell any difference between the two periods before or after an execution. The executions were highly publicized; one of them was the execution of four young men all in one evening for a murder—a bank robbery murder—yet there was no indication; the murders went on, the homicides went on just as regularly afterwards.

Q. Was this study a study that consisted of persons who before and after an execution committed willful homicides? A. Not as a person, no. Only of cases.

Q. But they did actually commit a willful homicide? A. No, what we did was—we had the execution date. We knew that execution date and for several weeks prior to that date and after that date we searched the records of the police department, the coroner, and the court, to find cases of homicides that had occurred in Philadelphia. We weren't interested in the persons who did them. We only wanted the cases and to see whether or not there were fewer cases immediately after an execution than before an execution; that is the kind of study it was.

Q. My point is, it took into consideration the fact that somebody had been destroyed, or suffered in your opinion a willful homicide? There was a dead body? A. Oh yes, indeed, there had been—

Q. You attributed the actual deaths to willful homicide? A. It was on the basis of police and coroner's data and so on.

Q. In your studies have you ever run across individuals who have not committed a willful homicide who have indicated to you that but for being faced with the death penalty they would have? A. I have not met any such person.

Q. Have you endeavored to make such a study? A. No.

Q. Have you run across a discussion of this in your studies? A. I have read opinions, yes.

Q. And have you read opinions that covered that particular topic? A. Not judicial opinions. Newspaper opinions.

Q. Have you ever pursued such information to make it part of your studies? A. No, I have not.

Q. Have you made a study of any police records that might indicate that there were individuals who stated they were deterred by capital punishment? A. I have not, no.

Q. In your concept of the term "deterrent," assume an individual stated that he did not commit a willful homicide because of fear of the death penalty, would that constitute a deterrent in your definition?

Mr. Gottlieb: Could I have the question back, your Honor?

(Reporter reads question.)

The Witness: You mean to say would I believe him?

The Court: No.

By Mr. Busch:

Q. Well, assume he is telling the truth. A. If he were telling the truth, then that is of course something that no one knows. What is the truth? I mean that he says so.

Q. Let's just assume for the purposes of the question that he is telling the truth, that he did not commit a willful homicide because he was in fear of the death penalty— A. Yes—

Q. —in your concept of deterrent, would that be a deterrent? A. If he is telling the truth then he would have been deterred. He would have been deterred. Presumably.

Mr. Leavy: What was that?

The Witness: I said "presumably."

By Mr. Busch:

Q. Have you ever had an opportunity to review a report of the California Department of Justice Bureau of Criminal

Statistics that was prepared for the then Senator Edmond J. Regan of the Senate Committee on Judiciary in 1960 as reflected the effect of executions on the death rate in California? That's 1963—excuse me.

The Court: Did you say "on the death rate"—"as reflected on the death rate"? Is that what you said?

Mr. Busch: On the homicide rate. Excuse me.

The Court: I wondered.

A. Well, I got all of those reports sent to me but I don't remember them. I don't remember seeing it.

Q. Have some of the reports that you have seen, statistical reports you have seen, indicated that following an execution there has been a decrease in the homicide rate within a particular state? A. I don't know of any.

Q. Would you consider such a report in your evaluation? A. Yes, I would consider it. I would also consider it very, very carefully, how the statistics were gathered and under what circumstances, because the statistical data is not always reliable. I would have to analyze it very carefully.

Q. If it did show, and assuming the statistical report met your standard of—

The Court: Excellence.

Mr. Busch: —excellence, and showed a decrease following an execution as a result in homicides, in the homicide rate, would that influence your opinion in any way?

Mr. Gottlieb: We object on the basis that this is calling for speculation, no ground, no foundation laid for the question.

Counsel has not provided us with the document to which he is apparently referring for review, so I object to the question as being speculation and without foundation. If counsel wishes to show that document, if it will be necessary, we will be glad to review it.

Mr. Busch: I think it is cross examination.

The Court: It will be overruled.

Have you forgotten the question, Doctor?
The Witness: Well, I'm afraid I have.
The Court: Read the question back.

(The reporter read the question.)

Mr. Gottlieb: We further object as a conclusion, this statement in the question which is the words "as a result".

The Court: It will be overruled.
You may answer the question.

The Witness: I would first of all ask during what day of the week executions occurred in California. That would be my first question because, if they occur during a certain period, the early part of the week, there are fewer homicides during the early days of the week. If executions occur on Fridays it will be followed by a great increase in homicides because of the fact that on Saturdays and Sundays, and Friday nights, those are big homicide nights, so that thereafter these are the things that I would have to question you about and a question that I would have to ask before I would know what credence to give to any report whatsoever of that kind.

Q. What if it covered a period of months and years? A. Well, what are the dates or days of the week when these executions occur? I must have a specific date set. Isn't it Thursday or Monday, or what?

Q. Would it make any difference, the day of the week, if it included a period of, say, three months after an execution? A. Well, I would have to study the report. I cannot answer a hypothetical question of that nature supposed to be based upon an actual published analysis. I need to see the analysis in order to be able to give an opinion.

Q. In the chart that you made reference to when Mr. Gottlieb was questioning you, Doctor— A. Yes.

Q. —you showed Maine and Rhode Island, is that right— A. Yes.

Q. —in comparison. A. Yes.

Q. And also Michigan, Wisconsin and Iowa. A. Iowa was at that time still retaining the death penalty.

Q. You had Michigan, Indiana and Ohio. A. Yes.

Q. Kansas, Missouri and Colorado. A. Because Kansas introduced the death penalty in the middle 1930s, having been an abolition state.

Q. North Dakota and South Dakota and Nebraska. A. Yes.

Q. Have you endeavored in any way to characterize the State of California with any other jurisdiction in the country? A. I have not, no.

Q. When you made reference to homicides being in greater number on weekends, did you endeavor to distinguish between wilful homicides that are capital offenses and for manslaughter? A. No.

Q. Or from felony-homicides? A. No, I did not.

Q. Have you ever made any studies to determine whether or not wilful homicides that are capital offenses are greater on weekends than on other days of the week? A. No.

Q. Or have you made any studies to show that felony-murders, capital offenses, are greater over weekends than any other time of the week? A. I have not.

Q. Such as robberies, burglaries, where homicides occur? A. No, I was referring only to homicides.

Q. As an over-all group? A. Oh, yes.

Q. Manslaughter? A. Oh, yes.

Q. Eliminating negligent homicide? A. I don't know about that but robberies always increase on the weekends. I mentioned there are several crimes that increase over the weekend period.

Q. But that has not been in the field of wilful homicides as a special study for you? A. No.

Q. Do you know of anybody who has? A. You mean on criminal homicides?

Q. That made a special study of these felonies, felony-murders? A. Felony-murders, yes.

Q. When did this occur? A. Oh, not specifically but one of my younger colleagues at the University of Pennsylvania

published a very, very well-done report on the patterns of criminal homicides based on the data for a five-year period drawn from various records, records from the police and judicial records and in that connection he didn't say that felony-murders more than the other homicides but it did not continue on to find these distinctions made in such studies.

Q. Do you, as an expert in the field, Doctor Sellin, feel that a survey could be made of the population in any way to determine whether persons who had not actually committed wilful homicide should be deterred because of the death penalty? A. I think it would be extremely difficult to make such a study. I don't know how it could be structured, an opinion survey of that nature. I would hesitate to make any comment on it.

Q. Have you endeavored to make a study of inmates of prisons who have not committed wilful homicides on a guard, as to whether or not these inmates were deterred by the threat of a death penalty? A. No, I have not, but in 1959 known offenders in this state in the Federal prisons, in the United States in 1965, those who did kill other prisoners or guards, with few exceptions, all were in death penalty states and they were not deterred under conditions when it was almost impossible not to escape detection.

Q. Have you ever seen anybody who has or heard of any that have tried to determine prisoners who have not committed wilful homicides? A. No, I know of no such study.

Mr. Busch: That is all, your Honor.

Redirect Examination by Mr. Gottlieb:

Q. Professor Sellin, you indicated you made reference to a study in Philadelphia that had been made recently, and would you indicate something of the details of that study? A. Well, on Palm Sunday 1966 there was a very brutal rape committed in Philadelphia. Three men went into a house and raped a grandmother, her daughter and

her granddaughter, and the old lady was so injured that she died afterwards. It aroused enormous public opinion in the citizenry and in the state because of the brutality of the crime. The Legislature was in session and there were demands for increased penalties for rape of all degrees but it did not seem to be a deterrent but the District Attorney did say that the death penalty had been used but used rather rarely but, nevertheless, the Legislature increased the penalties, doubled them, in fact, for practically every type of rape. That was interesting. It seemed to provoke a rather interesting study to see what the situation was prior to Palm Sunday and the days between Palm Sunday and the days when the law went into effect, and for a six-week period after the law went into effect to see what happened so far as the police knowledge was of rapes in the City of Philadelphia because we had access to all of the offense reports of the police departments and during the month before Palm Sunday and after, which was April 3, there were 26 forcible rapes and 19 attempts.

During the five weeks before the law was—between Palm Sunday and the signing of the law—there were 30 rapes and 12 attempts; and during the six weeks after the law went into effect there were 86 forcible rapes and 48 attempts. The only conclusion that we could draw was that so far as the increased penalty was concerned that it seemed to have no relationship to the rapes that actually were occurring. It was believed by some of those who urged the increased penalties that the people who were contemplating rape would be reading the newspapers and know all about the changes in the legislation and would take a rational attitude and govern themselves accordingly. This apparently did not happen.

Q. Professor, have you read any studies or been acquainted with any studies as to situations where the analysis referred to the possible stimulation of crimes of violence by particular modes of punishment? A. There are cases known and well documented where the present existence of the death penalty and the possibility of execution has served somebody as a means, an infrequent means of

committing suicide, being prevented by their religion or for some other reason from directly committing suicide, have committed a capital offense in order to be executed. I believe there is such a case now in California, if I am correct, where one prisoner is demanding to be executed, refusing all assistance because he wants to die. In the old days this was a fairly common one; in the 18th century, toward the end of the 18th century in Denmark it had become so common to commit a capital crime in order to be executed that a law was passed forbidding the execution of a person who had committed a capital crime with such a motive in mind.

One of the very well-known cases in Philadelphia shortly after the revolution was a young lieutenant who decided he was tired of life and he was going to go to a tavern and have a drink and then he was going out to kill the first person that he saw, because he wanted to be hanged. He did come out of the tavern but old Dr. Cadwallader met him and doffed his hat to him with such courtesy that the young lieutenant decided to kill the next man; he did, and he was promptly hanged. There are such few cases; these anecdotes might not be proper in this courtroom.

The Court: Very interesting, however.

Mr. Busch: Pardon me, your Honor—I don't think they are very relevant.

The Witness: Well, there have been cases where there has been evidence of stimulation and I think psychiatrists have demonstrated that, too.

By Mr. Gottlieb:

Q. Incidentally, if the Court please, since Dr. Sellin will be leaving today, and if counsel would provide us with the report that counsel referred to, perhaps we could review it at the noon hour in the event that there are any matters that it would be appropriate to comment on—would counsel provide us with that for that purpose? I ask the question through the Court.

Mr. Busch: We haven't used it with the witness.

Mr. Gottlieb: However, if counsel is thinking of using it at a later time in this trial—

The Court: How can he use it at a later time if the doctor is gone?

Mr. Gottlieb: If they are intending to use this in relation with any other witness, your Honor, we would like to see it.

The Court: Well, if they use it they will introduce it as an exhibit.

I am interested in one question, Doctor, in relation to your Philadelphia situation.

Is it possible there could be an increase in these statistics due to the fact that the public feeling became so aroused that prosecutions became more prevalent than they would under other circumstances?

The Witness: Oh, yes, that could possibly have happened, because certainly when it comes to let us say the Lindbergh law, I have never been able to convince myself that the death penalty had anything to do with it, but when you have only—as I think during the 30's—there were only about a hundred cases of kidnapping for ransom in the whole United States, and with all local, state and federal law enforcement authorities focusing on each one of these individual offenses, the market dropped out of kidnapping for ransom. I don't believe it was the death penalty. I think it became completely unprofitable.

The Court: What I was saying—your statistics show in the last few weeks this rate is practically doubling. Could that be due to the fact there was stricter enforcement during that period than there was during the prior period?

The Witness: Yes, it could have had something to do with it. I doubt that it would be such an enormous rise due to it.

The Court: I'd like to ask you one other question. What period of the year did the last six weeks cover?

The Witness: From May 12 to—well, May and June up to mid July, or something like that.

The Court: Anything further of the doctor by anyone?

Mr. Gottlieb: I want to refer to a matter that I should have taken up on direct, your Honor, very briefly.

By Mr. Gottlieb:

Q. You mentioned that you are member of the American Philosophical Society. Does that indicate that your field is philosophy? A. No, the American Philosophical Society is an organization composed of scientists and biologists and chemists and physicists and some philosophers, no doubt; but it was founded by Benjamin Franklin for the promotion of useful knowledge, and insofar as philosophy is useful knowledge it fits into the picture.

Q. Is this a society which includes in its membership Nobel prize winners? A. I think all the Nobel prize winners are in there.

Mr. Gottlieb: We have no further questions at this time.

The Court: Anything further, Mr. Busch?

Recross Examination by Mr. Busch:

Q. Doctor, the Philadelphia study that you made, that was not with reference to capital offenses, was it? A. No, it's not a capital crime in Pennsylvania.

Q. Do you know whether the reporting methods of the police changed after that? A. No, I don't think that the reporting method changed because the reporting method has been very very good in that city now for quite a

number of years, as a result of legal reforms; but it is conceivable that the enforcement methods and the patrolling may have increased as a result.

Q. Do you think that the public reporting might have been influenced by the publicity? A. That's difficult to say. I suppose that might occur. The definition of rape is so special and wide in some respects that one would have to study the cases. I think you are right, it might have induced some people to come forward and report, in some instances.

Q. Do you know whether the publicity given to the crime itself was greater than the ultimate change in the punishment, the publicity given that? A. No, that I do not think is true. It was true that at the time it was highly publicized, but it led to such a flood of arguments and interviews of prominent people as to what should be done to stop dastardly crimes of this nature and so on, that—it was front page stuff right along, and the pressure was on the legislature, and so on; so that the publicity given to the legislative effort certainly was the greatest, so that anyone who knew how to read and read a newspaper couldn't fail to know what was happening in the legislature and what the change in the law meant.

Q. Did you feel that that got as much publicity as the incident of the crime itself? A. I think so.

Q. The front page? A. Yes.

Mr. Busch: That's all. Thank you, Doctor.

The Court: May the doctor be excused?

Mr. Gottlieb: Yes, your Honor.

The Court: You may be excused, Doctor.

We will now take the noon recess until 2:00 o'clock.

(Whereupon the matter was adjourned until 2:00 p.m. of the same day.)

Los Angeles, California,
Monday, November 6, 1967;
2:00 P.M.

The Court: People vs. Thornton. Let the record show the parties and counsel are present.

Mr. Gottlieb: Your Honor, we will call Louis Joslyon West, M.D.

The Clerk: You do solemnly swear that the testimony you are about to give in the cause now pending before this Court shall be the truth, the whole truth, and nothing but the truth, so help you God?

The Witness: I do.

Louis Joslyon West, called as a witness on behalf of the defendant, having been duly sworn, was examined and testified as follows:

The Clerk: Be seated, please.

State your name, please.

The Witness: Dr. Louis, L-o-u-i-s, Joslyon, J-o-s-l-y-o-n, West.

Direct Examination by Mr. Gottlieb:

Q. Dr. West, you are a Doctor of Medicine, are you? A. Yes.

Q. Doctor, what is your specialization in that field? A. I am a psychiatrist.

Q. And at the present time with what institutions are you connected? A. Well, at the moment I am completing a Fellowship at the Center for Advanced Studies in Behavioral Sciences at Stanford, California, while on leave of absence from my regular job which, since 1954, has been professor and head of the Department of Psychiatry and Neurology and Behavioral Sciences at the University of Oklahoma, School of Medicine, in Oklahoma City.

Q. Doctor, would you state—refer to your education? Where did you take your training and what are your degrees? A. Well, I had my undergraduate training at the Universities of Wisconsin, Iowa and Minnesota. My de-

grees are Bachelor of Science from Minnesota in 1946; Bachelor of Medicine, Minnesota, 1948; Doctor of Medicine, Minnesota, 1949. I was graduated from the medical school in 1948 and received a doctorate after completion of a year of internship, as was customary then, until 1949.

Q. Where did you take your internship, Doctor? A. At the University of Minnesota Hospitals from 1948 to '49.

Q. And since that time with what hospitals and educational institutions have you been connected? A. I was a resident in psychiatry at the Payne-Whitney Clinic of the New York Hospital, Cornell Medical Center in New York City, from 1949 to '52; and during the last year of that period I also served as associate in psychiatry on the Cornell University College of Medicine. From 1952 to '56 I was a Major in the Air Force, Chief of the Psychiatry Service at the Lackland Air Force Base Hospital, San Antonio, Texas. And overlapping the last two years of that period, that is from September, 1964, until the present, I was simultaneously on the faculty of the University of Oklahoma, as I have stated.

Q. In addition to those matters, are you in association, and have you been in association with, the members of the psychiatric specialization of medicine beyond those within the institutions that you have mentioned? A. Yes, I have served as consultant to a number of local and state and national organizations; I was national consultant in psychiatry to the Surgeon General of the Air Force from 1958 to 1963. I have served on the editorial board of several medical and psychiatric journals; as a consultant to the National Aerospace Program; to the United States Committee of the World Medical Association; as vice-president of the Pan American Association; I am a past president of the Southern Professors of Psychiatry. At the present time I am serving on the National Advisory Mental Health Council to the Surgeon General of the United States Public Health Service; the National Advisory Committee on Alcoholism to the Secretary of Health, Education and Welfare; and either now or in the past have

served maybe 15 or 20 other agencies or organizations as a consultant.

Q. Beyond this what organizations of a professional nature are you a member, or have you been a member of? A. Well, I belong to somewhere between 25 and 30 professional organizations. I am a fellow of the American Psychiatric Association and have served for three years on their committee on research, six years on their committee on program; I am a fellow of the American Association for the Advancement of Science; a fellow or member of a number of other organizations, including the American Psychosomatic Society, American Medical Association, the Society for Psychophysiological Research; the Pavlovian Society; the Academy of Psychoanalysis; the Aerospace Medical Association; and so forth.

Q. And in what organizations have you held offices, organizations of a professional nature? A. Well, in each of those I mentioned.

Q. Well, you held office in each one? A. Well, I have held the offices mentioned.

Q. Have you had occasion during the course of your career to study the effects of confinement on humans? A. Yes, I have.

Q. And would you indicate in a general way what the nature of those studies have been and with what organizations you are conducting the [redacted]? A. Well, I made considerable studies of prisoners of war among my publications, a monograph, partly classified and partly not, on the subject of prisoners of war; a number of articles on the effects of forceful interrogations and so-called brain-washing of American prisoners by Chinese Communists and the effect of various procedures upon the health of people under confinement and other extreme conditions.

Q. Referring to what you have just mentioned, in what connection were you conducting those studies? A. Well, initially as an Air Force officer assigned to study the problems, particularly of forceable interrogations of Air Force officers who gave confessions of German warfare during the Korean conflict and subsequent to the time I left the

Air Force on a contract basis with the Air Force Intelligence Research Laboratory.

Q. On the same subject, Doctor? A. Yes.

Q. And did these studies consider individual case histories? A. Yes, they did.

Q. And did any of those case histories include the fact of the pendency or expectation of probable death? A. Yes.

Q. And in the course of this research, did you consider the relationship, if any, between the expectation or probability of death as one of the incidents of confinement in relation to the behavior of the persons studied? A. Yes.

Mr. Johnson: Your Honor, I will object to that as having no relevancy or materiality. We have gone through the distinction between conditions elicited from Dr. West as far as prisoners of war, which is not the subject under consideration here, and it just has no relevancy at all.

The Court: Well, I was just about of the same mind until you got down to the last part of the problem of death. I believe it is relevant. Overruled. Proceed.

Mr. Gottlieb: I am not sure whether the question was answered. Do you have the question in mind?

The Witness: Yes, and the answer is yes.

By Mr. Gottlieb:

Q. And do you have as part of your information as to these subjects the length of time during which a confinement, well, you know these facts as well? A. Yes, not only in relationship to the prisoners of war but also subsequently in relation to prisoners under other conditions, criminals who have been convicted in more than one state.

Q. Dr. West, rather than my going into, asking you detailed questions, I will now ask you to refer to those studies and to those parts of those studies that involve cases of extended confinement with the pending expectation or probability of death, describe them to the extent that you can describe also what you consider to be the effects on be-

havior and on the existence of the subjects which you studied. I may have left that very broad, but will you proceed from there? A. May I just respond to that in a historical way. Well, let me start out by saying that my areas of research in psychiatry have ranged rather widely from the biological aspects, of brain behavior, to issues in relationship between social and cultural areas and behavior and that the report of these variations have been published in some 70 or more articles and books and that many of these different aspects of my own are involved with the question of the death penalty and the effects of the expectation of death on prisoners only after I had myself participated in the study. Prior to that time I had no special opinion on the subject.

However, since July of 1952 when I served as a participant in an execution as the medical examiner, a hanging in Iowa, I was impressed with the nature and the complications of the problem and began to study it from a scientific point of view and have continued now throughout the years.

My opinion at this point, based upon the observations of prisoners, upon my work as an educator with the police and drawing even upon some of my own experiences during World War II as an enlisted man while I served for awhile in the Military Police, all leads me now to the view that the death penalty is not only useless to society either as a deterrent or for any other purpose but is a harmful influence for several reasons.

Q. Now as you proceed, would you refer, Doctor, to the studies which were referred to earlier that you did in connection with the Air Force, at a later time going into other aspects of these studies? A. Well, in some ways the studies that were done of prisoners of war, men who gave false confessions of germ warfare, merely served to instruct me and my colleagues who were with me on this question of how relatively easy it is for a determined captor to give almost any kind of testimony from someone over whom he has control. It isn't even necessary, as was shown in many

instances, to use elaborate physical torture if you have enough time with the prisoner to get him to confess to something that he has not done or even to convince him in some instances that he has in fact done something that he has not done.

Q. Now referring to the series of cases or the cases which are the subject of my question which involve the pendency of or the probability of death, how many cases did you consider? A. Well, of the eight Air Force prisoners that were studied in the particular research mentioned, well, of the Air Force prisoners there were some 86, and about three-fifths of these men were given what we considered to be the full treatment by their captors, made at one time or another false confessions of germ warfare and of the other defamations, I would say follows with great assurance.

Q. As to what extent, what part of that treatment that you mentioned in your opinion, as to what extent was the factor of the pendency of death a factor in causing them to break down? A. I don't know what you mean by dependence.

The Court: The pendency.

Mr. Gottlieb: Pendency. I will do it again.

The Witness: The likelihood of impending death.

Mr. Gottlieb: To what extent was the expectation or the effect of impending death, the pendency, based upon in your studies—

Mr. Leavy: I object—

Mr. Gottlieb: Let me finish my question, counsel—a factor in causing the behavior that you have referred to?

Mr. Leavy: I object to the subject matter relating to obtaining confessions, false or true, as now pertaining to the issues at hand.

The Court: Do you want to be heard?

Mr. Gottlieb: Well, your Honor, I am still attempting to complete the description of the circumstances from which we can then draw the question,

finally, of the availability of the experience and trying to determine now as part of the foundation on this particular fact.

The Court: It will be overruled.

Mr. Gottlieb: You may answer.

The Witness: Well, I really don't think that the expectation of death played much of a part in these Air Force prisoners. They were very uncertain about what might be done with them. I believe that uncertainty itself and the special circumstances of confinement, particularly social isolation and sleep loss, were the principal factors in breaking down their resistance; plus the tendency I think that any person develops very rapidly in a situation of confinement and complete dependency on other people, to do or say whatever is required, expected or even desired of them, simply because of the emotional regression that takes place under those circumstances.

By Mr. Gottlieb:

Q. After you completed these studies did you then make any further studies of persons in confinement? A. Well, since those days I have been increasingly interested in the factors that contribute to violence in our society. And in connection with this I have had occasion to examine a number of individuals involved in acts of violence, both victims and perpetrators; some before trial, some after sentences of various kinds, and some who have been awaiting the death penalty.

Q. Now referring to that group that were those who had been condemned to death, would you describe the nature of the studies that you made of that group? A. Well, these have been mostly in the nature of psychiatric examinations and psychological testing and—

Q. Where was this conducted? A. In prisons, either in Oklahoma or Texas.

Q. And were these a series of case studies as well? A. I'm not sure I could call them a series of case studies.

Q. I mean did part of the study involve your direct consultation or interviewing of the prisoners? A. Yes.

Q. And was part of this study based upon your reference to clinical or these reports of other such cases in the literature? A. Yes, other cases reported in the literature and also discourses with colleagues, prison psychiatrists and people involved in forensic psychiatry in other parts of the country with whom I increasingly have been inclined to compare notes.

Q. Did any of these cases which you studied involve persons in whom the appearances of mental disease occurred after confinement? A. Yes, very definitely so.

Q. Do you have any of those particular cases in mind? A. Well, one of my most—

Q. I take it you do? A. Yes, I do.

Q. Would you now refer to them, and in doing so present those details that you considered to be, or to have been important in your evaluation of the relationship between the confinement and the condemnation and the mental disease? A. Well, first let me say that each prisoner is an individual and no two are the same. Some are very severely affected by the Death Row type of situation; others appear on the surface to be relatively calm there. It seems to me that it is possible to identify certain states, certain mental states among prisoners on Death Row, and these states can change. A man can be in one state and move to another. I think a very common state of prisoners, especially shortly after sentencing, is one of detachment or numbness; a person is in a state of emotional shock and doesn't really seem to grasp the significance of the death penalty or what it implies for his own future. It is as though he can't imagine this all really happening, and such people will say, "It's as though the whole thing is happening to somebody else and it doesn't seem real."

Then there is the state of mind in which what you might call personality defenses are working very well, and a person tries to think of all kinds of ways in which the ultimate outcome will not transpire. His hopes will materialize around various prospects—that his sentence will be com-

muted, that new evidence will turn up that will help him, that the death penalty will be abolished before he is executed, and so on and so forth. Such individuals may appear to be quite cheerful at times and the fact that they are whistling in the dark, so to speak, only becomes obvious when you get beneath the surface a little bit either through interviews or psychological testing.

Then there is a third state of mind that also doesn't look too bad from the outside; it relates to a point I'd like to make when you give me a chance to; about certain individuals who are on Death Row because they want to be. These are individuals that I believe commit capital crimes in order to get themselves executed. They are not a large group but a very important group, and while they are on Death Row they frequently exhibit a kind of tranquility that is very hard for those around them to understand without appreciating the psychopathology that brought them there.

Finally, counselor—if I may complete my answer—there is a group of prisoners who suffer a kind of torment that is very difficult to put in to words. These are individuals who may at one time or another have been in any of the first three categories, who have come to grips with the fact that they are going to die. And the idea of being helpless and a captive in the hands of those who are in a position to keep them alive or to put them to death—the idea that they are actually going to be put to death—then constitutes a form of agony or despair that has no counterpart in ordinary medical practice, physical disease, or even psychiatric illness.

Q. Would you describe, Doctor, referring to one of those groups, that is the group that you mentioned that is found to have mental disease present, can you refer to some of those particular cases and describe the particular findings? In other words to review very briefly some of these case histories of those who were found to be afflicted with mental disease when confined in a Death Row, that is, awaiting death? A. Well, perhaps an illustrative case would be the

case of Jack Ruby, an individual that I examined a number of times subsequent to his conviction and the passage of the death penalty against him. During the period after his conviction he was in stage one, or condition number one of those that I described—shock.

Soon thereafter he apparently came to grips with his fate and was totally unable to accommodate himself to the idea that he was going to be put to death for the crime that he was convicted of. And very rapidly he became delusional, hallucinated, suicidal, and developed a substantial mental illness that persisted in fact until his death; and which may have contributed to it, as far as that goes.

Q. Any other examples that you can refer to, Doctor, in that category? A. Well, there are many examples in the psychiatric prison literature of mental illnesses that transpire among the inhabitants of Death Row, and since last year there were somewhere between 400 and 500 men on Death Row and only one executed—obviously this is a pretty sizable population living under stress.

Q. Have you had occasion to consider the relationship between physical and mental pain, that is, between the impact of stress on the body as such and that of the stress, fear, the expectation of death, the anxieties involved on the other—have studies been made that would shed light on the relationship between these two phenomena? And if so, are you familiar with those studies? A. Yes, I am familiar with those studies. I have carried out such studies myself. It is possible to measure the degrees of intensity of physical pain through the use of objective instrumentation. The Hardy-Wolff-Goddell apparatus for measuring the intensity of noxious stimulation and the subjective responses to it, make it possible to define approximately 21 increments of discernible change and pain experience. These have been put together into a scale, a so-called Dol Scale which has ten and a half points, each containing two increments. When you reach ten and a half Dols of painful stimulus, it can't hurt any more than that; that's the maximum amount of pain a person can feel, and increasing the amount of painful stimulation, whether it be burning or

pressure on the bone and so on, does not produce an additional degree of pain. It has been my experience that certain individuals who are actually subjected to torture, knowing about this and having been engaged in such experiences, as in a laboratory—I am thinking now here of certain physicians who were trained with Dr. Wolff and then who were subsequently captured, first by the Japanese and later in Korea, and subjected to some very painful stimulation, found comfort in the knowledge that things could only hurt so much. Biologically there was a limit, and they knew what that limit was and were able to endure.

Whereas in the psychological sphere, the type of anguish that comes from the knowledge that there are others in whose hands are helpless, who will when the time comes destroy us, doesn't seem to have any limit; there is no way to measure it; and I would regard such a torture as more severe than anything that could be inflicted by thumb screws, racks or pain machines of the kind we use in the laboratory.

Q. To what extent, Doctor, in your professional opinion, can the application of the mental stress, the mental pain that you have mentioned, be a factor in the causing of insanity? A. Well, I believe that it can be causative of mental illness either temporarily or permanently, and that this indeed takes place in Death Row type of situations all the time. That doesn't mean in all cases, but that it is going on all the time, as long as you've got a Death Row.

Q. And in your opinion what significance does that phenomenon and causal relationship that you have just mentioned have in indicating the extent, the quantity of mental pain involved? A. Well, there is—I don't know how to answer that question. Could you rephrase it?

Q. Yes. You have indicated that there was a ceiling in effect on physical pain, there is a limit beyond which the stimulus cannot result in a further increase in the degree of physical pain. You have also indicated that as to what we will call for the moment—and I may be inaccurate in referring to your testimony—as mental pain, that this has been a factor in causing of insanity. Now what I am asking is

whether that last statement, that is, that last fact, is one that indicates the extent to which, the quantity of mental pain, if there is such a thing as a quantification, is involved in the pendency of death on Death Row? A. I would say so far as one could take derangement as a result of severe stress in life, that these findings would suggest very strongly that the degree of mental pain and anguish or torment experienced by people under these conditions is greater than that resulting from any kind of purely physical pain, and that there is no method for measuring it, because the types of techniques that we use to measure physical pain reach an end point, whereas there is no end point to this other kind within the bounds of sanity.

Q. Within the bounds of sanity you say. Well, now can it be said, is there a limit, is there a ceiling, on mental pain other than that which might result from the production of an insanity? A. I don't know of any ceiling on it. I have no way to measure it.

Q. Is it your testimony, Doctor, that there is a ceiling on physical pain? A. That is correct.

Q. But this is a stress which produces anxiety and it will continue to increase as mental pain, as the stress and anxiety increases? A. Yes, that seems to be correct.

Q. Without limiting, except the limitation that comes within this, is that your testimony? A. That is right.

Q. Does that mean that any conclusion can be drawn as to the comparative relationship between that physical pain which might be induced by physical torture and, on the other hand, a mental pain which might be induced by the pendency of death, one or the other? A. What it suggests is that ultimately at least the degree of suffering involved in mental pain is capable of being greater in terms of human experience than that involved in this kind of physical torture.

Q. The case cited in 1959 by the United States Supreme Court, of Trop vs. Dulles, and in which the punishment was the creation of a condition of statelessness, deprivation of citizenship, to which the court said the punishment was illegal because, among others, trying to subject an indi-

vidual to an ever increasing amount of fear and distress, and now can you compare, Doctor, based upon your understanding, your experience, your clinical evaluations and your readings, is this kind of degradation of fear and distress imposed upon a Death Row inmate, how is it as compared to that imposed in the case of this kind that I've just described? A. I would regard it as substantially greater; in other words, while depriving the person of his citizenship suggests a terrible loss of support by the parent society, the Death Row situation employs not only loss of support but the ultimate threat by the parent society, namely, that of destruction. There are many reasons based upon research and human development that I believe this is the most severe stress that is possible for a human being to experience.

The Court: We will take the afternoon recess.

(Recess.)

The Court: People vs. Thornton. Let the record show the parties and counsel are present.

Mr. Gottlieb: Dr. West.

(The witness resumed the stand.)

By Mr. Gottlieb:

Q. I referred very briefly to your professional writings, that is, writings that you have produced for professional journals and, Dr. West, would you indicate some of the writings that relate, that is, the problems, the matter of pain and suffering and confinement that is the subject of your earlier testimony. A. Well, if I were to list articles that bear upon my earlier testimony they even really go further than that. There is a monograph entitled "Explorations in the Physiology of Emotion" and other works on the effects of prolonged stress, and I have published articles on problems like brain-washing, racial violence and other aspects of violence, conflict between one man or groups of men and each other which I believe are relevant to this.

In addition, there have been articles on pain, sleep loss, sensory isolation and various types of stress, all of which I think are relevant to the question of why people suffer who are on Death Row and what the nature of that suffering might be.

Q. Now, Dr. West, you have testified just before the recess that as to the comparison between the physical pain which can be produced by stimuli on the body and in fact there is a maximum, which the body of experience of pain will not increase, and you have also testified that there is no ceiling with respect to mental pain. Would you indicate why that is true? A. Well, in somatic pain, physical pain, you are dealing essentially as a matter of the brain, not of information flow of the periphery of the body to the center, a line in the neurons or nerve fibers which only carry so much. At that point, unless you have got a maximum amount of information coming in that total, not just stays, well, just stays so long and it can't hurt any more, but the suffering of the kind that people undergo under the conditions of Death Row, even under stress and the very nature of what it means to the human being, the things that I have defined as human beings from other animals who also experience physical pain and have feelings, and that is the same apparatus except in human beings it is developed in a different way; our nervous system works faster than the rest of our body in comparison with other species and those of us, even while we are perfectly capable of realizing our circumstances in childhood, every child who survives then has done so in relationship to other human beings and on whom he is totally dependent for the sustenance of his life and also is inescapable to withdrawal of the support destroying him. If he feels from this threat to the psychological integrity of the human being as opposed to any other kind of creature, that in which the parent or parent society or culture or nation or what it is withdraws his support, and an example that you gave of a recent case in which this was found to be the loss of citizenship was found to be an unduly harsh punishment, I think that is quite justified on that basis because the country or the

society, the community, is in fact an extension of the parent to the individual. It is a part of that body of other people on whom you are dependent for life and support, our own humanity.

Now, when the State decides to not only withdraw its support in the form of citizenship, but goes beyond that to the ultimate point of saying, "We will now destroy you as a person, and we choose to do this—it isn't forced upon us, it isn't necessary, you are helpless, you are captive, you have no recourse, impose no threat; but we will destroy you anyway." This attacks the very fiber of the individual's humanity because that is the way he became a human being, therefore the suffering that derives from that, I believe, is the most intense of all.

Q. Doctor, considering the fact, as has been stated by a previous witness, that the average stay on Death Row has been, at least during some years, a thousand days; considering then the projection of that which you have described over a period of a thousand days, would you state what you can of the comparison between that experience under the pendency of a death sentence, and the experience of physical tortures applied to the body? A. Well, there are many painful illnesses known to people; some of them go on for years, and while man can be tormented through physical illness to the point that he may seek his own life or something of that sort, it is not common to see a man driven to the point where he loses his identity, which is to say, develops a significant psychosis, mental illness, insanity, madness.

Q. As the result of physical pain? A. As the result of physical pain or disease alone. The Death Row situation, which might have been termed a thousand days once—it is probably a good deal longer than that now—even allowing for periods during which a person has fluctuated between hope and despair, the periods of hope are always followed, when they are followed, by periods of despair that much worse. Under these conditions it is not uncommon, as everyone knows, for prisoners on Death Row to develop either temporary or, in many instances, permanent mental de-

rangements. And of course what happens under these conditions is kind of paradoxical—the patient gets sent then to an institution for the criminally insane, and the physicians there are put in the peculiar position of being asked to cure a man of his mental illness so he can be sent back to be executed. In point of fact, this almost never happens, so you have people who really remain in the facilities for the criminally insane for indefinite periods of time.

Q. Doctor, did you have a meeting during the past year with members of your profession and specialization at which the death penalty was considered? A. No, not within the past year but—

Q. Or two? A. At the annual meeting of the American Psychiatric Association in Atlantic City in May of last year, the death penalty was discussed for the whole of an afternoon by, I would estimate, a couple of thousand members of the American Psychiatric Association, by several colleagues from other fields and myself.

Q. Referring to the question of whether the death penalty is cruel, was any conclusion reached by that body?

Mr. Busch: Objected to as calling for hearsay.
The Court: It will be sustained.

By Mr. Gottlieb:

Q. Did you, as the result of that experience, learn whether there was a relationship between the standards of humanity, as understood by psychiatrists, and the death penalty?

Mr. Busch: That I would object to as being irrelevant and immaterial.
The Court: It will be sustained.

By Mr. Gottlieb:

Q. May I address the Court on both matters, your Honor?

The Court: Yes.
Mr. Gottlieb: We offer to show, your Honor, and

this is the reason for the question, that in a body composed of men of excellence in their field and representative of the psychiatric profession, and who deal with the problem of understanding of humans and of the human state, that the group with substantial unanimity concluded that the death penalty was a violation of the—

The Court: Are you testifying? I ruled on that as being hearsay. You are not putting that into the record by way of argument on an objection. When you get up here to make an argument, make the argument on the point and not a lot of other business which you want to get in the record. I am going to put a stop to that. You argue the point and stay with it.

I think the question is also vague; that would be an objection I would have to it.

Mr. Gottlieb: I will restate the question, your Honor.

Mr. Wirin: May we have just a moment, your Honor?

The Court: Yes.

(Counsel for defendant confer.)

By Mr. Gottlieb:

Q. Dr. West, is the opinion which you have given as to the extent of mental suffering and pain based to any extent on the considerations that you have given to the matter in consultation with other psychiatrists? A. Yes.

Q. And in part has it been based upon the transactions of the meeting to which you have referred? A. I would say yes to that, with the understanding that these don't constitute a scientific poll of the profession by any means, but would represent what I consider to be naturally a group of people who have a special interest in this problem, and had looked into it in a way similar to the way that I had looked into it. In other words, I know a great many

psychiatrists who feel as I do on this matter, but I would not offer to speak for the profession or to propose that I could state what percentage of my profession would agree with me.

Q. You base your opinion, however, on your consultations with members of your profession on the subject? A. Well, I feel—my contact has been with those members of my profession who have investigated the subject along the same lines that I have; those are the ones with whom I have consulted and whose writings I have read and so on. There is no question just from the scientific literature and what has been published along these lines that virtually everyone who has studied this question has come to pretty much the same conclusion, namely, that this is a very severely stressful circumstance—that of Death Row—and that the morbidity of the individuals who are subjected to it is very high.

Q. In your opinion, is the maintenance of capital punishment cruel? A. Yes, sir, in my opinion it is.

Q. And in your opinion is the maintenance of capital punishment the maintenance of a form of torture as to any substantial component of the Death Row population? A. Insofar as torture might be seen as the deliberate infliction of unnecessary suffering upon individuals helpless to escape, I would say definitely yes.

Q. Dr. West, have you had occasion to inquire into the effects of the presence of the institution of capital punishment on crimes of violence? A. Yes, I have, and if I may state my conclusions on this subject—

Q. Please do. A. —there are three ways in which I feel that the existence of the death penalty in any given state or country has an untoward effect upon the population with regard to violence among them.

The first effect is one that has been noted by many others, particularly by Albert Camus, which is that the state, by taking life, deliberately offers an example of violence, so that people are growing up in a community where from time to time lives are taken, are exposed to an official

climate of life-taking, which is bound to have an untoward effect upon them.

The second proposition, and this has been put forward by a number of behavioral scientists in the western world, is that the state, by offering an example of solving problems by killing people, essentially instructs the young that this is one way to solve problems, and thereby makes it more likely, in some ways that it is very difficult ever to measure, that violent solutions will be sought by such individuals.

The third, and from the point of view of my own experience the most specific way in which I believe the death penalty acts to perpetrate violence rather than prevent it, is through its stimulation of certain abnormal people to commit crimes of violence in order to force the state to commit the ultimate act of violence upon them.

Now we know that people who commit acts of violence tend to be very self-destructive also. In countries where better statistics are available, this has recently been very well documented; for example, in a book published 18 months ago by D. L. West of Cambridge, a criminologist. He pointed out that in Britain in recent years one-third of all individuals who committed homicide eventually took their own lives.

In Denmark it was 40 per cent.

Now the cases that I have seen have been individuals who committed murder, either consciously and deliberately in order to force the state to execute them; or without fully realizing that this was their intention, but nevertheless primarily motivated by this.

The only man executed in the United States last year was James French, a man who came from California, where he had committed some murders for which he was never caught, to Oklahoma where he committed a murder; and at his trial he requested the death penalty, but he got life imprisonment because his attorney had pleaded him guilty—his court-appointed attorney. He made a great to-do about this and protested; he wrote a letter to the

Judge, he wrote letters to the Supreme Court and so on and so forth, and to the Governor, indicating that he felt that he should have been executed and why hadn't they done it. When these various recourses did not produce the desired result, James French one day, after carefully making preparations beforehand, strangled his cell mate to death, the cell mate being a man against whom, by his own admission, he had no grudge.

Thereupon he presented himself to the Warden and said, "Now I believe the State of Oklahoma will execute me as it should," and it took three trials after that, and considerable expense to the state—because of course this procedure can be enormously expensive—but eventually after haranguing the jurists himself and insisting that they invoke the death penalty on him if they weren't hypocrites, James French finally last year got the execution that he desired.

Now he killed at least two people that I know of in order to bring that result about.

There is another prisoner in Oklahoma today who committed several acts of violence in a conscious attempt to produce the death penalty or to get it invoked against himself, and the incidence of other such cases is well known; it has been described by people like Professor Sellin, Karl Meninger, Frederick Wertham and a number of others who have written on the subject; but since I am not primarily a forensic psychiatrist, the frequency with which I have encountered this myself is so high as to make me suspect that it occurs more frequently than our records and statistics would lead us to expect.

About two years ago an Oklahoma truck driver stopped at a Texas cafe to get a sandwich; a stranger walked in the door; a farmer from nearby came in and blew him in half with a shotgun. When the police came to take the shotgun away from him and asked him why he had shot a perfect stranger he said, "I was tired of living." This man was mentally unbalanced, but he lived in Texas and he was in good enough contact with the laws and practices of the

state to expect that having killed somebody, he would in turn be killed.

In addition studies of individuals who were convicted of murder that they did not commit themselves, borrowing somebody else's homicides, so to speak, which suggest that at least a substantial portion of these people are seeking the province of execution that the State seems to offer.

Now it seems to me that when you have practice in a society that obviously does so much mischief and creates so much trouble without doing a particle of good, as Professor Sellin's research has developed over a period of three years, and has made abundantly clear to me, it should be thoroughly explored on the subject of defendants that we are out to get rid of and, furthermore, it seems to me that people know that and so that every year the number of executions dwindles down to the point where now there probably will be 10,000 people slain in this country this year and so for only one execution that is no longer really a practical solution.

The Court: We are not talking about abolition. We are talking about cruelty of the death penalty and not abolition.

The Witness: Yes, sir, I am sorry. I got carried away.

The Court: Let's not go on with that lecture. I don't like to cut you off.

The Witness: I understand.

The Court: It is all very interesting.

Mr. Gottlieb: No further questions.

Cross Examination by Mr. Johnson:

Q. Dr. West, I am Bob Johnson, Deputy District Attorney. A. Yes, sir.

Q. From the context of your words it appears that you are definitely against capital punishment, is that correct? A. I have become so.

Q. Do you feel your mind is in such a state that it is still open to persuasion or unalterably reasonable argument

to the contrary? A. All of my convictions are held open until further notice.

Q. Your mind is open? A. Yes.

Q. Are you a member of any organizations, societies, foundations, fellowships or anything that have as one of their tenets or principles the abolition of the death penalty? A. No, I am not.

Q. You on occasions have appeared before legislative hearings or the like to express your views on the abolition of the death penalty? A. No, I have never done that although I have lectured in opposition to it recently.

Q. Dr. West, in listening to you and listening to some of the instances that you cited it seems that many of these examples come to with somewhat degree of—with what you have, and you might have spoken of these examples before, is that roughly correct? A. Yes, these are examples from my own experience that I am very familiar with.

Q. You have lectured on some of these examples before, have you? A. Recently, yes.

Q. You told us of your employment by the University of Oklahoma and then you told us of your membership in some 24 fellowships and societies? A. Rough estimate.

Q. Was that a minimization of the number of societies? A. It is a minimum figure.

Q. In excess of 24 then. Do you also have a private practice? A. No, I really am not in private practice.

Q. Are there occasions when you see individuals in your busy schedule? A. Yes, I do see some patients in private consultation.

Q. And then there are these speaking engagements that you have around the country, is that correct? A. A certain number.

Q. And in addition to those obligations and commitments, is it also true you are appointed by the courts of Oklahoma and Texas on occasions to examine individuals that have been convicted of crimes? A. Well, these occasions have been relatively rare but I have done this.

Q. And there have been occasions that you have gone to the Death Rows of Oklahoma and Texas and have these all been court appointments or instances where you have been retained by private funds? A. Let me put it this way, counselor. I have never examined anybody under these circumstances for a fee. I have either served as a friend of the court or for a favor either to a judge or to a court-appointed attorney and even when I did not come into the case as amicus curiae, I always write a report that I sent to the judge and to both sides.

Q. There have been how many instances then that you have visited individuals in Oklahoma and Texas, the total number, the total number of individuals, please. A. The total number of individuals of what description?

Q. On Death Row in Oklahoma and Texas. A. Well, let me put it this way. Since Death Row isn't always a place, if I were to estimate the total number of individuals I have seen who have been convicted of capital crimes, and this was either before or after conviction or in relationship to such, I would estimate it, I would say around a dozen.

Q. That would be roughly divided between the two states of more or less the same number for each of the two states? A. No, I would say about two to one in favor of Oklahoma.

Q. Then in each of these instances, say 8 to 4 for Oklahoma and 4 to 8 for Texas, and have you made it your practice to read the entire transcript of the trial? A. If there had been a trial beforehand, and if the transcript was available to me, I have done so. In the Ruby case, for example, at the time I was called in the cell by Dr. Smith who was then temporarily serving as his attorney, there was no transcript available because Ruby was bankrupt and they couldn't afford it. I didn't have it, at least it wasn't available to me.

Q. Just to be sure we understand each other, these 12 that you mentioned in Condemned Row, these 12 people, had they had trials, were they pending trial of capital cases or were these 12 convictions? A. No. I can say they were 12 who were condemned.

Mr. Gottlieb: Let him finish his answer.
The Court: I thought he had finished his answer.

By Mr. Johnson:

Q. Just how many was it that were actually condemned? A. People that I have seen after they were condemned?

The Court: That is what he wants.
The Witness: Well, I guess I would place that at about 8 or 9 and then I would toss in a couple of those who were not in Oklahoma or Texas but in other countries or, well, I was thinking of one case in the Federal Prison but that was not a death penalty case.

By Mr. Johnson:

Q. And in every instance where there was a transcript, you have read the transcript in its entirety, is that correct? A. In every instance if there was a transcript available to me, I have read it.

Q. So that on occasions you may have to read as many as 5000 pages of trial transcript, roughly, is that correct? A. I can't say how many pages but I have read a lot of pages of trial transcripts.

Q. Going back to your position you stated at the start you are opposed to the death penalty regardless of the nature of the crime and number of killings and the wantonness of the killing and the premeditation, of whether treasonous, or whatever it might be, you are opposed to it? A. I have become so, yes.

Q. In other words, in conclusion, in seeing these individuals these 8, 9 or up to 12, had you made an effort to study their backgrounds, the nature of the crime committed, their background prior to the commission of the crime that occasioned imposition of the death penalty? A. Yes, I have.

Q. And that you have done from all of the instances where you have made studies? A. Wherever possible, in fact, I have even endeavored particularly hard to do that since that is the greatest area of my interest.

Q. Incidentally, Doctor, did you ascertain the nature of he defendant's crime here? A. I know about it only very lightly. I don't know the case. I have not read the transcript and I am not familiar with any of the details.
Q. Just out of curiosity would you mind stating it?

The Court: Counsel, what relevancy is that?
Mr. Johnson: I will withdraw the question.
The Court: All right.

By Mr. Johnson:

Q. Now as far as these occasions that you have been to Death Row in Texas and Oklahoma and elsewhere, when you examined the individuals, it was with the knowledge in your mind, and this is a question, that those individuals wanted off Death Row, is that correct; they wanted to get out of Death Row without imposition of the death penalty? A. No, sir, and take the case of French, for example, and I knew that here was a man who invited execution and who was there by his own request. That was a matter of public knowledge and I was quite curious about him.
Q. Of course, individuals do these things for many reasons and were you aware or did you know whether this French was just trying to secure a little notoriety or something like that? A. Well, sir, I am not omniscient, but when you come to an examination, sir, I am a psychiatrist and I think that most of the time I am eliciting material that is genuine and when a patient is malingering, we usually can detect it, with exception.
Q. Fine, with exceptions. You have seen individuals that wanted to be on Death Row, that wanted the death penalty, and others that wanted to get off Death Row without imposition of the death sentence, is that a fair statement?

Mr. Gottlieb: I object to that as being an improper assumption.
The Court: I don't think that is objectionable on that ground.

By Mr. Johnson:

Q. Is that a fair assumption, whether or not you examined the patient with that thought in mind? A. Really, I can't answer that question in the affirmative because I think of these individually and you just can't generalize. I could think of one example, the Ruby case, where the man really did not want to leave where he was because he was delusional and he felt that if he was taken away, it meant he was going to be tortured to death and he wanted to stay where he was. He felt there was no likelihood or possibility that he could possibly be reprieved or that any appeal was possible because he was convinced that he was going to be put to death as a result of a plot that had never occurred in public and his public trial was just a mockery.

Q. Fine, Doctor. And maybe we can come to the point a little more rapidly. You don't take these individually except maybe with the rare exception such as French, that had any intent of self-survival that would do anything they could to get off Death Row without the imposition of the death penalty, is that a fair statement?

Mr. Gottlieb: Could we have it read, your Honor?

The Witness: Well, I understand the question.

It is a reasonable question and it is one that commonly comes up, isn't it. Wouldn't you expect that people who are on Death Row would pretend to be crazy in order to get off and sent to a hospital and so on.

Q. Yes. A. Every now and then people on Death Row are malingering a mental illness in an effort to escape penalty. My experience, however, is that, and it is remarkably uncommon and I have often wondered why, most of them don't try to do it. Most of the people that I have seen under those conditions were not in my opinion attempting to do any such thing and certainly in the Ruby case, if that is what you are implying—

Q. I did not have in mind any definite case. I am suggesting to you there are those on Death Row, when they

are not spending their times writing Appellate briefs, are spending all of their times trying to get the assistance of a psychiatrist to drum up either temporary or other areas of mental aberrations, is that a fair statement? A. I think it is a terribly unfair statement, counsellor, and it is suggesting for one thing that the people on Death Row are blithely playing games instead of suffering the torment of the damned and it further suggests that physicians are conspiring with them to outweigh the law of the land.

Q. Doctor, do I understand that your—that you purport by that statement—

The Court: I am going to restrict you from any further cross examination.

Mr. Johnson: Nothing further.

The Court: I don't want to restrict your whole cross examination, just that line.

Anything further?

Mr. Gottlieb: No questions, your Honor.

The Court: You may be excused, Doctor.

Call your next witness.

Mr. Gottlieb: Your Honor, I underestimated my opponents with respect to their examination and it seems like we are a little bit early and we do not have any witness presently waiting for any more testimony today. I apologize to the Court for my miscalculation.

Mr. Johnson: May the Doctor return for a moment to the stand?

(The witness resumed the stand and testified further on cross examination as follows:)

By Mr. Johnson:

Q. Doctor, in your answers you suggested there might be some alternative of a prolonged period of confinement where they run as long as 1000 days, is that what you were saying? A. Or more.

The Court: What he said probably is it lasted longer than that; isn't that what you said?

The Witness: Yes.

By Mr. Johnson:

Q. That is saying that it would probably last longer than 1000 days and you appreciate that generally the delay, the long period of time, was occasioned by repeated appeals?

The Court: Counsel, I don't see that that has anything to do with the problem.

Mr. Johnson: Okay. May I then withdraw that partial question, your Honor?

The Court: Yes.

By Mr. Johnson:

Q. Doctor, you indicated a protracted confinement on Death Row in your examination exceeded the punishment for a person deprived of their citizenship and is that a correct paraphrase of what you said before? A. Yes.

Q. And is this according to some standard accepted criteria or have you personally established that this prolonged confinement is more arduous, more tortuous or is this some accepted standard? A. It is my opinion, sir.

Mr. Johnson: Thank you. I have nothing further.

Redirect Examination by Mr. Gottlieb:

Q. Your opinion is based upon your professional knowledge and study, Doctor? A. Yes.

Mr. Gottlieb: No further questions.

The Court: You may be excused.

All right, gentlemen, we will adjourn today. 9:30 tomorrow morning.

(Here an adjournment was taken at 3:45 o'clock p.m. to Tuesday, November 7, 1967, at 9:30 o'clock a.m.)

APPENDIX B

A Brief History of Prisons and Penitentiaries

In his famous essay on *Crime and Punishment* in 1764, Cesare Bonesana—known as Beccaria—wrote the following remarks on the death penalty:

> In order that a punishment be just it should have only the degree of intensity sufficient to keep men from committing crimes. No one today, in contemplating it, would choose total and perpetual loss of his own freedom, no matter how profitable a crime might be. Therefore the intensity of the punishment of perpetual servitude as substitute for the death penalty possesses that which suffices to deter any determined soul.[1]

What was particularly new in Beccaria's suggestions for penal reform was the idea of substituting life imprisonment for the death penalty. One of the reasons that this was an innovative idea was that no sufficient prison system then existed for such purposes. Indeed, in the nineteenth century there were *no* satisfactory alternatives to the use of capital punishment. As Leon Radzinowicz points out in his two volume study of the history of English criminal law, the only conceivable alternatives, transportation and imprisonment, simply were not workable substitutes. Although called "prisons," the existing structures for detention were simply not capable of transformation into large-

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[1] Cesare Beccaria, "On the Penalty of Death," from a 1764 treatise, *Dei delitti e delle pene*, as in: *Capital Punishment*, ed. Thorsten Sellin (New York, 1967), 41.

scale prisons. "It was generally admitted," Radzinowicz further states, "that prisons were centers of corruption, in need of very thorough reform."[2] This was obviously a major problem for those who, influenced by Enlightenment thinkers such as Beccaria, wished to reform existing penal codes. The historian W. David Lewis put it this way: "One reason why rationalists did not quickly seize upon imprisonment as a satisfactory correctional method was a humanitarian consideration typified by Eden's remark that "jailers are in general a merciless race of men."[3]

Galleys and ships had been tried as means of imprisonment, but not so much with the idea of reforming either penal codes or prisoners as with the purpose of using slave labor. The British began using prison hulks in 1776 and continued the practice down to 1858.[4] Frequently the prisoners were plagued by vermin, disease and severe floggings, and along with hardened criminals were thrown the feeble-minded, the insane, and boys as young as two years old.[5]

In addition to simple confinement in hulks was the practice of transportation whereby prisoners were used as slaves in ships taking them to penal colonies. Life was excessively harsh on the transportation ships and in the colonies and it is little wonder that reformers did not see transportation as a viable alternative to capital punishment. For example, in 1790, 158 out of the 502 prisoners on board

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[2] Leon Radzinowicz, *A History of English Criminal Law and Its Administration From 1750* (London, 1948), I, 32.

[3] W. David Lewis, *From Newgate to Dannemora: The Rise of the Penitentiary in New York, 1796-1848* (Ithaca, New York, 1965), 19.

[4] Harry Elmer Barnes, *The Story of Punishment; A Record of Man's Inhumanity to Man* (Boston, 1930), 117.

[5] Barnes, 119.

the ship, "Neptune" died in transit to Australia, and in 1799, 95 on board the "Hillsborough" perished.[6] Of the many men sent to French Guiana, 87% never left alive.[7]

The problem of alternatives was not restricted to Europe. As late as 1837 the state of North Carolina required death for arson, burglary, highway robbery, theft of bank notes, slave-stealing, burning a public building, concealing a slave with intent to free him, the second offense for forgery or "mayhem," and being an accessory to robbery, burglary, arson or mayhem, as well as other offenses. One of the reasons for the severity of these laws is indicated by Hugo Bedau: "This harsh code persisted so long in North Carolina partly because the state had no penitentiary and thus had no suitable alternative to the death penalty."[8] In the colonies, a "prison" might consist of an abandoned mine (as in one Connecticut town) or a pit with a grating at the top (as in Maine).[9] Such prisons were privately owned and the inmates were used as slave labor, much as in the European penal colonies.[10]

There were some efforts made at reform in the eighteenth century, but they came to little. In England, John Howard visited various prisons and found at some, "no allowance of food at all," no water except for two inches on the floors of some dungeons, no sewers, and prisoners kept in irons.[11] In prisons across Europe he discovered condi-

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[6] Barnes, 74.

[7] Miriam Allen deFord, *Stone Walls; Prisons From Fetters to Furloughs* (Philadelphia, 1962), 26.

[8] Hugo A. Bedau, "General Introduction," *The Death Penalty in America*, ed. Hugo Bedau (Chicago, 1964), 7.

[9] deFord, 19.

[10] deFord, 20-21.

[11] deFord, 51.

tions as bad and even worse, but his reports were unable to get any substantive change accomplished.

In America, in Penn's colony, there were some changes made around 1682, but this was a short-lived experiment and apparently unique in that century. One hundred years later the writings of Beccaria were beginning to have an influence in America and Dr. Benjamin Rush delivered a lecture in Benjamin Franklin's house in 1787 on the need for building a penitentiary. A year later Dr. Rush wrote an essay, "Inquiry into the Justice and Policy of Punishing Murder by Death" in which he argued that doing so was both impolitic and unjust.[12] If there was any general interest among the colonists for replacing the death penalty with imprisonment, however, it had to wait upon the events of the Revolution and the subsequent Constitutional Conventions.

The leader in penal reform in this period was the state of Pennsylvania which had made efforts in 1776 to substitute imprisonment for various forms of corporal punishment.[13] In 1786, the death penalty was removed for robbery, burglary, sodomy or buggery, and the former practices of burning a hand, cutting off the ears, nailing the ears to the pillory, pillorying, and whipping were eliminated. In 1791 capital punishment for witchcraft was repealed. The general trend established by Pennsylvania is described by historian Harry Elmer Barnes:

> In the generation following the American Revolution, Pennsylvania was the first state to abolish the cruelties of the English jurisprudence and to substitute imprisonment at hard labor for the various degrading

[12] Bedau, 7-8.

[13] Barnes, 105.

types of corporal punishment. The Walnut Street Jail in 1790 was the earliest institution in America in which these principles were adopted.[14]

The gradual building up of a penitentiary system as an alternative to corporal and capital punishment stood in sharp contrast to the history of the first 150 years of Pennsylvania when the "whole system of criminal jurisprudence was founded upon [the] fundamental premise of punishment as social revenge. . . ."[15] Indeed, for some years there was a mixture of the old and the new idea, for it was not until 1850 that this concept of revenge began to change.[16]

The Walnut Street Jail experiment soon had more prisoners than it could handle and in 1803 a new county prison was erected in Philadelphia. It was not, however, until 1818 when legislation prepared the way for the Cherry Hill penitentiary, opened in 1829, that the first "really permanent achievement in the establishment of the state prison system" was made.[17]

The year 1829, then, could stand as the real beginning of the penitentiary system in America. Two forms of prison administration battled for acceptance in the years following, the Pennsylvania system as exemplified by Cherry Hill where prisoners were kept in strict isolation from each other, and the Auburn system from New York where prisoners were allowed to work together, although in enforced

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[14] Harry Elmer Barnes, *The Evolution of Penology in Pennsylvania; A Study in American Social History* (Montclair, New Jersey, 1968), 2.

[15] Barnes, *Evolution*, 6.

[16] Barnes, *Evolution*, 7.

[17] Barnes, *Evolution*, 117.

silence. At the Auburn penitentiary flogging was used extensively and somewhat indiscriminately, epileptics and the insane coming in for a full share of the beatings.[18] In time the Auburn style won the approval of the other states, and they began to build their own prisons, albeit without any idea of rehabilitation or reform of the prisoners. San Quentin was established around 1850 with a code of excessively harsh discipline and punishment (whippings were frequent and the use of 1½ inch hoses for "shower baths" was not abolished until 1882),[19] and its methods were not uncommon. Despite the lack of interest in rehabilitation, however, it could be said that by 1835, after "several bad starts the American states . . . had finally enjoyed a decade of active prison development. The criminal codes had quite generally been revised, and most of the states had substituted imprisonment for the traditional corporal punishments."[20]

A second wave of reform, beginning in the 1870's, was to bring in those ideas on prison administration which we recognize as modern. The "Elmira system" of New York, established in 1889, combined the various features that progressive reform had been seeking for fifty years: the commutation system, the practice of the progressive classification of prisoners, the indeterminate sentence, parole, and productive and instructive labor.[21]

Thus it was not until almost the twentieth century that a completely satisfactory alternative to capital and corporal punishment existed in the form of reformatories where prisoners could be rehabilitated. The ideal of such

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[18] deFord, 68.

[19] deFord, 71.

[20] Blake McKelvey, *American Prisons: A Study in American Social History Prior to 1915* (Chicago, 1936), 16.

[21] Barnes, *Evolution*, 2.

men as Beccaria, John Howard, and Benjamin Rush had been realized and the extent to which the "viable alternative" had arrived is best indicated by this statement from Hugo Bedau:

> Of all the persons today in state and federal prisons, only about one in a thousand is under sentence of death. The obvious inference is that the death penalty in our country is an anachronism, a vestigial survivor of an earlier era when the possibilities of an incarcerative and rehabilitative penology were hardly imagined.[22]

[22] Bedau, 31.

APPENDIX C

Some Further Glimpses of Capital Punishment: Father Dingberg and San Quentin Psychiatrist David G. Schmidt

SCHMIDT, DAVID G., M.D.
(San Quentin Chief Psychiatrist)

As physician and psychiatrist at San Quentin, I have witnessed more than 200 executions by lethal gas.

Lethal gas as a method of execution requires dropping cyanide pellets into sulphuric acid. Hydrogen cyanide is produced and when inhaled replaces the oxygen in the blood. In the technique of preparing the man for the execution, the man, the offender, is always encouraged to take deep breaths on going into the gas chamber.

Summary of Testimony, Dr. Schmidt, in *People* v. *Thornton,* R.T. 382-383.

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Electrocution results in a very much quicker death than lethal gas. There is instantaneous death. I have compared our system of execution with that of Utah, where they have the firing squad, and again the firing squad—with the firing squad you have almost instantaneous death—quicker, much quicker.

Execution by lethal gas is an asphyxial death. When a person dies in the gas chamber, he dies by choking to death, by suffocation.

Executing a man, in my opinion, is an admission on our part that we haven't any better solution to this problem of a man who has committed homicide. It has been my experience that most of the men—I have examined these men

—and most of the men—and I have had my staff examine them thoroughly and repeatedly not just once or a dozen times but hundreds of times—and most of them fall into the group of mental defective or borderline defective or psychotic; that means they are insame or mentally ill; or they are severely neurotic; they are driven by their primitive impulses, which are so strong that the individual has little or no control of their direction, and less than one-quarter of them belong in this sociopathic group that acts out and is really a criminal type.

I feel that [execution by lethal gas] is atavistic or it is antiquated or it is in some way uncivilized for us to execute a man when we don't know what better to do with him.

DINGBERG, FATHER EDWARD J.
(Former Death Row Roman Catholic Chaplain)

Describing what took place with a typical person awaiting execution, beginning from the day before, in the event of the man being a Catholic, I would bring him Holy Communion and take care of the sacramental aspects of ministration.

In addition to that there would be the matter of discussing with him perhaps things that would pertain to his family, things that he might want written to them, said to them; also of course, obviously, he would be highly on occasion emotional; there would be an attempt to try and reconcile him to what was about to happen.

I would usually see him in the morning, the day before, around 8:30 or thereabouts, and perhaps stay with him for an hour or so, then return in the afternoon. He would be brought downstairs on that afternoon at 4:00 o'clock, so I would stay with him until that time. After 4:00 o'clock I would stay with about two hours.

I would visit him again after that and stay with him during the night until usually 2:00 or 3:00 o'clock in the morning. I would return to see him again on the morning of the execution, usually about 7:00.

I think certainly during the hours of the night there is a growing, an obvious growing fear; there is still the clinging as the hours go on, to a forlorn hope, and you begin to recognize that the man is now in a great traumatic period.

He begins to become mofe and more needful of custody on the part of the death watch. He constantly moves around the cell, almost reminiscent of a pacing type of thing—almost animalistic in some respects.

The constant asking for reassurance, both in terms of the possibility of living beyond 10:00 o'clock in the morning, and then the possibility of, will he be treated perhaps with some mercy by Almighty God—all of these things tend to blend themselves in with things that seem to be totally out of keeping with the sense of almost losing track of what it is that is really happening—an attempt to somehow blind himself to the reality of what is going on.

Approximately at 7:30, of course, the guards who are actually going to be involved in the execution, will arrive with the need to test all of the equipment. This is not an attempt to impose on the man any more hardship, but perforce of their duties there are noises and so forth which he is aware of, and this is when the problem of keeping him in some degree of touch with reality becomes even more and more intense.

The fear begins to be expressed more frequently, the twitching of the face and all the rest that would be attendant therein.

There is a telephone there. In the event the phone were to ring this could mean that he had gained a reprieve or

commutation or whatever. When the phone rings, of course there is an immediate almost holding of breath with the expectation of hope, and then the attendant falling apart as the result of finding that it was a routine call.

Summary of Testimony, Father Dingberg, in *People* v. *Thornton*, R.T. 644-45, 647-649.

DINGBERG, FATHER EDWARD J.
(Former Death Row Roman Catholic Chaplain)

An example of how the death penalty violates the dignity of man, I did observe in one particular instance an individual who I considered, when I first encountered him on Condemned Row—I had previously known him on the Yard—and that he seemed to be able to relate, seemed to be able to express himself adequately well in terms of his thoughts, his feelings; and over the period of two or three years I observed that this became less and less possible, it became more and more difficult to talk with the man.

The climax, of course, as I observed it, was the actual attempt on the morning of his execution to take his own life, which I felt had been indicated by my observations previously; it had been noted in the long that this had been also a concern of the custodial staff. That would be one specific case.

I recall another instance of a man with whom I had a very close association because he was a member of the Catholic faith, and there of course, obviously, I observed, apart from my knowledge—of which I am not privileged to speak—but my observations apart from my dealings with him as a priest *per se*. He, too, the day before he was to be executed, took his own life.

I have had occasion to visit with prisoners on Condemned Row at or about the time he would be advised of some ad-

verse ruling by a court and that he would be awaiting a definite date of execution. The news would be completely shocking to him, with the attendant result that he would be in a highly nervous, anxious state; that the quality of fear would be very, very discernible, the almost panic type of asking for assurance: "Do you think that there is still the possibility that something might happen?" and so forth and so on. Which of course would not have characterized him in any sense the day before.

The others on the Row would have an empathy if not a sense of identification with the prisoner, for reasons that perhaps would be varying. Some would feel that some of the factors that were involved in his case would be in their own, therefore the element of hope would obviously lessen.

In general, I think they would all feel that any execution that would be carried out would necessarily affect them. It would take away from them even more pertinently that element of hope which they always are trying to claim.

Summary of Testimony, Father Dingberg, in *People* v. *Thornton*, R.T. 640-642.

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When I was at San Quentin Prison, the population generally was in the neighborhood of about 5000 men. Of that number registered, it would be that one-third would be Catholic, and quite obviously, I would have particular contact with them, and in addition, of course, there would be others who would seek counselling or advice who would not necessarily be of the Catholic persuasion. My guess would be that in any given week, perhaps the chaplain would interview in a given day possibly from 45 to 50 men, in a year about 1500 men.

I don't know the exact number, but I would think I have witnessed perhaps 30 executions.

My present opinion is that capital punishment as conducted in California definitely offends the dignity of man, as I understand it, the actual taking of his life, and this, of course, is not the greatest indignity. It is the piecemeal dying, the disintegration of the personality, of the emotional part of man, almost a decaying within himself of the soul, that precedes the actual mortal death.

My opinion is that the emphasis on the basic importance of the individual, the recognition within my own church as enunciated by Pope John, leads me to feel that there is an evolving concept of the value of the human personality which perhaps was not too clearly understood or delineated previously. Dingberg, *id.* R.T. 624-625, 626, 627-628.

APPENDIX D

Assertions of Deterrence and the Circularity of Violence*

The notion that crime can be understood on a scientific basis is rather recent. It developed well after English Common Law concepts regarding penal sanctions had become firmly established. In fact, "we must wait until Henry Mayhew published his *London Labour and the London Poor* in 1854, and *The Criminal Prisons of London and Scenes from Prison Life* in 1862 before we can say that any systematic effort to understand the nature of crime in that country (England) was underway." (Barker 1968:229) Today we are faced with the task of subjecting the Common Law assumptions of bygone centuries regarding capital punishment to modern, scientific scrutiny.

Is there an empirical rationale for retaining and inflicting the death penalty? Can it be empirically established that capital punishment serves a deterrent and a protective function for the social systems that employ it?

In an article commissioned by the *International Encyclopedia of the Social Sciences,* presenting a social science review of capital punishment "independently of clique positions" and "entirely expressive of the times," (Johnson 1968:xiii).

Francis A. Allen observed that the crucial issue "whether capital punishment possesses a deterrent efficacy lacking in other less drastic, nonlethal sanctions available to the state when performing its obligations of public order." (Allen 1968:292, see also Bedan 1970:209).

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* The bibliography of works cited in this Appendix D is found on page 89a, *infra.*

COMPARATIVE DETERRENT ADVANTAGE & DEATH PENALTIES

The asserted justification for imposing the death penalty is that it is a more effective deterrent to homicide than the other less drastic, non-lethal sanctions available to the state in performing its obligations to maintain public order.

Social science evidence does not support the hypotheses, and negates any greater deterrent efficacy of capital punishment. Neither is there empirical support for the assertion that it is a more effective deterrent than other penal alternatives to crime in general and to homicide in particular.

Data on the issue incudes scientific studies and summary statements by sociologists, criminologists and penologists of the highest reputation. Sutherland and Cressey point out, for example, that in general, "when the homicide rate in states which authorize the death penalty is compared with the homicide rate in other states, it is found that the former states have a homicide rate two to three times as great as the latter." (Sutherland & Cressey 1955:292) They add that:

> On the average the European states which have abolished the death penalty have lower homicide rates (which generally means lower murder rates in Europe) than states which retain the death penalty. The Scandinavian countries which have abolished the death penalty have homicide rates about one-half as high as England, which has retained the death penalty. (Sutherland & Cressey 1955: 294)

Indeed: "Statistical findings and case studies converge to disprove the claim that the death penalty has any deterrent value. The belief in the death penalty as a deterrent

is repudiated by statistical studies since they consistently demonstrate that differences in homicide rates are in no way correlated with differences in the use of the death penalty." (Schuessler 1952: 62)

As of 1961 eleven states had temporarily removed the death penalty. Sellin summarizes the known statistics on their respective experiences.

> Arizona had no death penalty for murder from December, 1916 to December, 1918. The governor of the state reported to the British Select Committee on Capital Punishment in 1931 that 41 murderers were convicted in the two years before abolition, 46 during the abolition years, and 45 during the following two years.
>
> Colorado abolished capital punishment in 1897 and returned to it in 1901. The average annual numbers of convictions for murder during the five years before abolition, the abolition years, and the five years following were, respectively, 15.4, 18, and 19. The corresponding figures on convictions for manslaughter were 2.6, 4, and 1.5.
>
> Delaware abolished the death penalty in April, 1958, and reinstated it in December, 1961. The average annual number of murders and non-negligent manslaughters was 22.3 during 1956-1958 and 14.3 during 1959-1961.
>
> Iowa had no death penalty from 1872 to 1878. During the seven years before abolition the average annual number of convictions for murder was 2.6. This figure rose to 8.8 during abolition and to 13.1 during the following seven years. The death penalty was again abolished in 1965.
>
> Kansas lacked a death penalty between 1907 and 1935. The five years before 1935 showed an annual

average homicide death rate of 6.5, the next five years, this rate was 3.8.

Maine first tried abolition during 1876-1882, but the lack of data make any useful comparisons fruitless. Final abolition came in 1887.

Missouri abandoned the death penalty in 1917 and brought it back in 1919. The homicide death rate per 100,000 population during 1911-1916 averaged 9.2 a year and during abolition 10.7; during 1920-1924, it was 11.

Tennessee abolished capital punishment for murder in 1915 but retained it for rape. Reinstatement of the punishment came in 1919. Homicide death rates are available beginning with the year 1918, when the rate was 6.9 for whites and 29.2 for the colored population. Except for a slight drop in 1920 in the white race, both rose steadily after the introduction of the death penalty to 10.8 for the whites and 52.5 for the colored population in 1924.

Oregon had no death penalty during 1915-1920. Information supplied to the British Select Committee on Capital Punishment in 1931 indicated that 59 "murderers" were committed to the state penitentiary during the five years before abolition and 36 during the abolition years.

South Dakota re-introduced the death penalty in 1939, having abolished it in 1915. Identical average annual homicide death rates were reported during the five years before and the five years after the restoration.

Washington was without the death penalty during 1913-1919. The average annual rate of deaths due to homicide was 6.5 during 1908-1912. "In 1913 it was

> 6.5, but it rose in 1914 to 10 and then gradually fell to 8.9, 5.5, 5.5, and 4.2 (1918). The year the death penalty was again introduced, the rate rose to 7.5 but during the next five years, 1920-1924, it was 5.1, 5.9, 5.2, 4.7, and 6.2. The average annual rate was 6.8 during the period of abolition and 5.8 during the first six years after the re-introduction of the death penalty. (Sellin 1967: 122-4)

In short, a review by categories shows that there is no evidence that the abolition of the death penalty causes an increase in criminal homicides or that its re-introduction is followed by a decline. The explanations of changes in homicide rates must be sought elsewhere. (Sellin 1967: 124)

Sutherland and Cressey point out that:

> A method of testing the deterrent value of the death penalty is by comparing, in the states which have abolished the death penalty the homicide rates before and after the abolition. The general conclusion from this comparison is that the states which abolished the death penalty had no unusual increase in the homicide rates. . . . Some of these states restored the death penalty after a few years, on the ground that the murder rate had increased greatly after the abolition. The statistics show, however, that the changes in homicide rates were almost exactly parallel in other states which made no changes in their laws regarding the death penalty. (Sutherland & Cressey 1955: 295)

Statistical comparisons before and after abolition in foreign jurisdictions are consistent with the experiences of jurisdictions in the United States. Andenaes found that in Sweden, after abolishment of capital punishment for in-

fanticide in 1861, the infanticide rate decreased. (Along with other factors, Andenaes credits the decrease in the harshness of penalties as a factor contributing to the decline in the infanticide rate. (Andenaes 1971: 541-42)

Schuessler states that for European countries which have abolished capital punishment, there is no significant difference between murder rates before versus murder rates after its removal. (Schuessler 1952: 58-59)

Although another respected, contemporary researcher, Jack Gibbs, is quite critical of evidence gathered in the field, nevertheless, he underscores the scientific soundness of research supporting abolition argument. According to him these conclusions:

> Sophisticated studies compare the offense rate before and after the abolition of the death penalty. This strategy permits the reasonable assumption that etiological factors have not changed substantially. On the whole, such comparisons suggest that fluctuations in the capital offense rate do not reflect the abolition of the death penalty. (Gibbs, 1968: 517)

Gibbs also cites the findings of the 1962 United Nations publication, *Capital Punishment*: "All of the information available appears to confirm that such a removal of the death penalty has, in fact, never been followed by a notable rise in the incidence of the crime no longer punishable by death." (Gibbs, 1968: 517)

Mark Ancel concludes that such behavior represents a misguided sounding and appropriation of public sentiments for revenge. Ancel reasons that:

> . . . abatement of the penalties attached to certain offenses has hardly ever led to an increase in the

> number of such offenses. The progressive abolition during the nineteenth century of crimes for which capital punishment might be inflicted proves this contention, which is borne out by criminal statistics. . . . What really deters the potential criminal is the unleashing of the machinery of justice that forces him to account for his actions before the appropriate court. The need to satisfy public opinion is often put forward as a justification of the severity of the penalty. This attitude confuses retribution with legal intimidation. What public opinion really wants is the appearance of the criminal before the court as soon as possible after the offense has been committed. (Ancel 1968: 380)

The comparison of neighboring states, one of which has capital punishment, one of which does not, holds constant factors associated with region of the country such as cultural and subcultural variation. With respect to such comparisons, Sellin reports:

> An inspection of the (statistics) shows. . . . that within each such group of continuous states (abolitionist and retentionist) it would be impossible to identify the abolitionist state, were it not designated as such . . . The conclusion is inevitable that the presence of the death penalty—in law or practice—does not influence homicide death rates. (Sellin 1967: 135-138)

In comparing neighboring states, both of which had similar cultural characteristics and both of which retained the death penalty, Vold cross-compared northern and southern counties in Iowa and Missouri. He concluded that factors *other than* the retention of the death penalty, accounted for the variation. (Vold 1932)

POLICE SAFETY AND CAPITAL PUNISHMENT

Thorsten Sellin has conducted one of the most exhaustive statistical analyses ever undertaken in conjunction with testing the validity of the frequent assumption, that retention of the death penalty is a significant factor in reducing the mortality risks of police work. His study refutes that argument. Some of his pertinent findings follow:

> One argument for the retention of the death penalty is the contention that if it were abolished, the police would be more likely to be killed or injured by criminals or suspects when they are encountered. It is assumed that the presence of the threat of possible execution deters persons from carrying lethal weapons when they engage in crime or from using them against the police when they are in danger of arrest. These opinions have been voiced on many occasions . . .
>
> In the author's seminar in criminology at the University of Pennsylvania during the academic year 1954-1955, several studies were carried on relating to various aspects of capital punishment. One of these studies was specifically designed to secure data on the comparative risk of a policeman's being injured or killed by a criminal or suspect using a lethal weapon. It was hoped that by securing data of this nature from cities in capital punishment states and in abolition states, some idea might be gained of the extent to which the police might be better protected in states with the death penalty. . . .
>
> The claim that if data could be secured they would show that more police are killed in abolition states than in capital punishment states is unfounded. On

the whole, the abolition states, as is apparent from the findings of this particular investigation, seem to have fewer killings, but the differences are small. If this, then, is the argument upon which the police are willing to rest their opposition to the abolition of capital punishment, it must be concluded that it lacks any factual basis.

. . . During 1961-1963 there were 140 policemen criminally killed in the United States by offenders or suspects, an average of 47 per year. Nine of them were killed in the then abolition states—two in Michigan, four in Wisconsin, two in Minnesota, and one in North Dakota. No policeman was killed in Maine or Rhode Island.

In nine death penalty states bordering on the above states, 21 policemen were killed—four in Massachusetts, four in Indiana, four in Illinois, five in Ohio, three in Iowa, and one in Connecticut. No policeman was killed in New Hampshire, South Dakota, or Montana.

If we compute the risk of a policeman being killed, using as base the number of police in these 15 states according to the 1960 census, we find that the annual average risk for the three years was 1,312 per 10,000 police in the abolition states and 1,328 in the bordering states. There was, then, no significant difference. We need not stress that 131 of the homicides occurred in death-penalty states . . .

The claim that if data could be secured they would show that more police are killed in abolition states than in capital punishment states is unfounded. On the whole the abolition states, as apparent from the findings of this particular investigation, seem to have fewer killings, but the differences are small. If this is,

then, the argument upon which the police is willing to rest its opposition to the abolition of capital punishment, it must be concluded that it lacks any factual basis. (Sellin 1955: 138, 140, 152-153, 301 in Bedau)

Joseph Lohman, one time Sheriff of Cook County, Illinois (Chicago) and Dean and Professor of Criminology at the University of California, Berkeley, testified in *People* v. *Thornton* to the effect that the death penalty was not an aid in securing lower risks of violence in police work:

> Capital punishment does not deter or bring about a salutary reduction (in homicide) for police officers; it does not protect and secure them and all it indicates is that if a conclusion is to be reached, which I reached, it is to the effect that police are more in danger in capital punishment States than they are in abolition States. (*People* v. *Thornton* R.T. 586)

In 1968 the California Legislative Assembly Committee on Criminal Procedure reported that Los Angeles homicide and assault rates against police officers conform to the pattern testified to by Dean Lohman:

> The State of California has . . . experienced more than five years of increased penalties for attacks on law enforcement officers.
>
> During this same period, 1961 to 1966, the rate of attacks on Los Angeles policemen went from 8.4 per 100 officers per year to 15.8, an increase of 90 percent.
>
> *After five years of increasing penalties, a Los Angeles policeman was almost twice as likely to be attacked as he was before the increases.* (California Legislative Assembly 1968: 27-28)

In a statistical analysis of police killed in action, C
darelli considered the notion that capital punishment
terred the use of violence against law enforcers. Accord
to Cardarelli:

> Thorsten Sellin in an earlier study compared
> rates of police homicide for the six states which h
> no death penalty with the neighboring or borderi
> states. One of the purposes of his study was to arri
> at some answers to the argument that the abolition
> the death penalty adversely affects the safety of t
> police. No major differences were discovered amo
> both groups and Sellin concluded:
>
> > It is obvious from an inspection of the data th
> > it is impossible to conclude that the states whi
> > had no death penalty had thereby made the polic
> > man's lot more hazardous. It is also obvious th
> > the same differences observable in the gener
> > homicide rates of the various states were reflecte
> > in the rate of police killings.

In the light of the above findings, identical compari
sons, using the present data, were made to determin
whether the same results would be obtained. Six aboli
tion states and the nine bordering death penalty state
were included for comparison. Rates of death pe
1,000,000 inhabitants were computed for each state
In addition, we computed the rate of police killed pe
number of police employed by each state.

In comparing the rates for the abolition and the
death penalty states, we note very little difference.
For both groups, only one police officer was killed for
every two million people during the three years ana-

lyzed. Two of the six abolition states recorded no police deaths over the three year period while three of the nine death penalty states recorded no police deaths. The differences in the rates based on the population for each state are quite small. The range for both groups is very similar according to the rates per employed police, and the overall group rates are almost equal. (Cardarelli 1968: 451)

PRISON SAFETY AND CAPITAL PUNISHMENT

Frequently one hears the death penalty defended as an indispensable measure to safeguard the lives of inmates and staff in penal institutions. Those who advance this argument believe that murderers who are sentenced to life imprisonment or receive a commutation of their death sentences will be deterred by the threat of execution from committing a homicide in prison, even though that threat did not prevent them from killing someone in the first place.

The validity of this argument could be ascertained by a study of homicides in state and federal prisons. Therefore, the author sent a schedule to prison administrators in the United States early in 1966 requesting certain information on fatal and non-fatal assaults in their institutions during 1965. In order to eliminate the common variety of petty fights that result in no real injuries, data were requested only on assaults in 37 jurisdictions (10 reported that none had occurred such as death, hospitalization, or some other incapacitation). . . .

There were no fatal assaults in the abolitionist states of Alaska, North Dakota, Oregon, Rhode Island, West

Virginia and Wisconsin. Maine supplied no data. O
the other hand, four such states reported a total o
eight killings, of which two were committed by prison
ers serving time for felony murder (Iowa) or second
degree murder (Michigan).

Of jurisdictions having the death penalty, 17 wer
reported free from prison homicides in 1965: Con
necticut, Delaware, the District of Columbia, Florida
Kentucky, Maryland, Montana, Nevada, New Hamp
shire, New Jersey, New Mexico, New York, Ohio, South
Dakota, Utah, Vermont, and Wyoming. Nineteen re
tentionist states and the Federal system reported 5
homicides. . . .

The hazards of life in prison have just been illus
trated. To imagine that they can be completely re
moved is visionary, but it is equally visionary to believe
that the threat of the death penalty could play any role
in reducing them. They can be lessened only by insti
tutional management. This is a task which challenges
the imagination and intelligence of administrators, be
cause prisons are unnatural institutions, especially the
maximum-security ones where the most serious offend
ers are most likely to be found. They bring into
enforced daily contact, within a relatively confined
area, hundreds and sometimes many thousands of per
sons of the same sex, usually males in early adulthood
or early middle age, most of whom come from social
groups in which a resort to physical violence is fa
miliar. Their associations and relationships in prison
at times lead to frictions ending in arguments settled
by a physical encounter. This is, after all, not un
known in the world outside, which provides a more
normal milieu for a man. (Sellin 1967: 154, 158-9)

See Sellin testimony in *People* v. *Thorsten*, Appendix A, pp. 8a-9a.

Dogan Ackman in his study of Homicides and assaults in Canadian prisons found that:

> . . . it is highly unlikely that the commutation of the death sentence has caused an increase in the life and occupational hazards for prison staff and inmates, and it is very difficult to believe that the hazard rates were lower before the policy of commutation was adopted by the government.
>
> We may conclude the discussion by stating that, within the limitations of this study, the argument that the commutation of death sentences increases the life and occupational hazards in prison finds no empirical support. Not only has commutation not led to further violence by those whose sentences have been commuted, but attenuation of the threat of the death penalty resulting from an unprecedented high rate of commutations has not resulted in a general increase of homicidal and assaultive behavior in Canadian prisons. (Ackman 1967: 168)

According to research conducted by Albert Morris, criminologist at Boston University,

> . . . of 121 assaults with intent to kill, committed in the penal institutions of twenty-seven of our states between 1940 and 1949 inclusive, none were committed by prisoners sentenced to be executed for murder whose sentences had been commuted to life imprisonment for murder; and 111 were committed by prisoners for other offenses . . . It is of some interest also to

note that four out of the six states which do (not) have capital punishment for murder were among those having no assaults with intention to kill during this ten year period. (Massachusetts 1958: 21-22)

III. Circularity of Violence

Data on capital punishment and the imposition of violence as a sanction suggest that society's imposition of the death penalty recycles violence back into the society. Numerous social scientists have taken such a position.

Sutherland and Cressey acknowledge that "it is maintained that in punishing criminals society expresses the same urges which are expressed among criminals in committing crime." (Sutherland & Cressey 1955: 301) Palmer states that, "Perhaps violence whether it be severe punishment, or murder, or suicide, perpetuates and gives rise to violence." (Palmer 1965 in Gibbs 1968: 253)

Julia Johnson mentions an historical incident illustrating this point, "On June 21, 1877, ten men were hanged in Pennsylvania for murderous conspiracy. The New York *Herald* predicted the wholesome effect of the terrible lesson. 'We may be certain,' it is said editorially, 'that the pitiless severity of the law will deter the most wicked from anything like the imitation of these crimes.' Yet, the night after this large scale execution, two of the witnesses at the trial of these men had been murdered and within two weeks five of the prosecutors had met the same fate." (Johnson 1939 in Barnes & Teeters 1959: 315)

Testimony by Dr. West in *People* v. *Thornton* raises three important points concerning the relationship between criminal violence and societally sanctioned violence.

Dr. West testified:

". . . there are three ways in which I feel the existence of the death penalty in any given state or country has an untoward effect upon the population with regard to violence among them.

The first effect is one that has been noted by many others, particularly by Albert Camus, which is that the state, by taking life, deliberately offers an example of violence, so that people are growing up in a community where from time to time lives are taken, are exposed to an official climate of life-taking, which is bound to have an untoward effect upon them.

The second proposition, and this has been put forward by a number of behavioral scientists in the western world, is that the state, by offering an example of solving problems and thereby makes it more likely, in some ways that it is very difficult to measure, that violent solutions will be sought by such individuals.

The third, and from the point of view of my own experience the most specific way in which I believe the death penalty acts to perpetrate violence rather than prevent it, is through the stimulation of certain abnormal people to commit crimes of violence in order to force the state to commit the ultimate act of violence upon them." (Testimony by Dr. West, *People* v. *Thornton*, 85-86)

A major contribution of the social science—available to the Court as it has not been available earlier—comes from the laboratories which are able to conduct controlled investigations. These experiments and inquiries show that violence is circular. That violent tendencies are triggered in normal individuals—and that the triggering is facilitated and reinforced, indeed—when they are provided by the

punisher's sense of rectitude, is shown and repeatedly confirmed in the experiments of Berkowitz and others. This new and important body of scientific knowledge adds one more change to the context of constitutional review. See:

1. Berkowitz and Rawlings, "Effects of Film Violence on Inhibition Against Subsequent Aggression," *Journal of Abnormal and Social Psychology* 66:405-412 (1963)

2. Goldstein and Arms, "Effects of Observing Athletic Contests on Hostility," *Sociometry* 34:83-90 (1971)

3. Berkowitz, "The Effects of Observing Violence," *Scientific American* 210:2:35-41 (1964)

4. Berkowitz and Macaulay, "The Contagion of Criminal Violence," *Sociometry* 34:238 (1971)

5. Bandura, "Vicarious Processes: A Case of No-Trial Learning," in Berkowitz, *Advances in Experimental Social Psychology: Vol. II* 1-55 (1965)

6. Berkowitz, "Some Aspects of Observed Agression," *Journal of Personality and Social Psychology* 2:359-369 (1965)

7. Berkowitz *et al.*, "Film Violence and Subsequent Aggressive Tendencies," *Public Opinion Quarterly* 27:217-229 (1963)

8. Berkowitz and Geen, "Stimulus Qualities of the Target of Aggression: A Further Study," *Journal of Personality and Social Psychology* 5:364-368 (1967)

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APPENDIX E

Biographies of Non-Legal Authorities

BEDAU, HUGO ADAM, Associate Professor of Philosophy, Reed College; B.A. University of Redlands, 1949; M.A. Harvard, 1953; Ph.D., Harvard 1961; Danforth Teaching Fellow, 1957-58; Carnegie Fellow in Law and Philosophy at Harvard Law School, 1961-62; member, American Philosophical Association; member, American Society of Political and Legal Philosophy; director, American League for the Abolition of Capital Punishment; author, *Nomos VI: Justice,* 1963; editor, *The Death Penalty in America,* 1964.

CRESSEY, DONALD R., Professor of Sociology and Criminology, University of California at Santa Barbara; consultant, President's Commission on Law Enforcement and the Administration of Justice, 1965-66; consultant, New York State Joint Legislative Commission on Crime, 1967; recipient, Sutherland Award of the American Society of Criminology, 1967; author, *Principles of Criminology, Theoretical Studies in the Social Organization of Prisons, The Structure and Functions of Confederated Crime.*

DINGBERG, EDWARD J., Roman Catholic priest; Pastor of St. Isabella's Parish, San Rafael, California; Roman Catholic chaplain at San Quentin Prison, California, 1948-1961.

DUFFY, CLINTON T., penologist and warden; secretary to Warden James B. Holohan, San Quentin Prison, 1929-1937; Warden, San Quentin Prison, 1940-1951; Secretary, California Board of Prison Terms and Paroles, 1937-1940; member, California Adult Authority, 1952-1961; author, The San Quentin Story, 1950; 88 Men and 2 Women, 1963.

ESHELMAN, BYRON E., clergyman; Protestant chaplain at San Quentin Prison, 1957-present; resident chaplain, U.S. Penitentiary, Alcatraz Island, 1946-49; Fellow American Protestant Correctional Chaplains Assn.; author, Death Row Chaplain, 1962.

GIBBS, JACK P., Professor of Sociology, Washington State University; B.A. Texas Christian University, 1950; M.A. Texas Christian University, 1952; Ph.D. Oregon, 1957.

LOHMAN, JOSEPH D., Criminologist, sociologist and college dean; Dean of the School of Criminology, University of California at Berkeley, 1961-present; Senior research sociologist for the State of Illinois, 1934-39; Chairman, Division of Corrections, State of Illinois, 1949-52; Chairman, Parole and Pardon Board of Illinois, 1952-53; member, Research Advisory Council, California Department of Corrections; American Sociology Society; Illinois Academy of Criminology; American Prison Association.

SCHUESSLER, KARL F., Professor of Sociology, Indiana University and chairman of the Department of Sociology; A.B. Evansville College, 1936; A.M. University of Chicago, 1939; Ph.D. Indiana University, 1947; Resident Sociologist, State Prison, Illinois, 1938; member, American Sociology Society; Statistical Association of Criminology.

SELLIN, THORSTEN, Criminologist, Professor emeritus, University of Pennsylvania; Professor of Sociology since 1926; Fullbright lecturer, University of Cambridge, 1959-60; President, International Society of Criminology, Paris, 1956-65; President, International Penal and Penitentiary Foundation; past president, Eastern Sociological Society; member, American Philosophical Society, American Society

of Criminology; consultant, Penal Code Commission of Sweden, British Royal Commission on Capital Punishment; member, Advisory Committee, American Law Institute on Model Penal Code; Editor, *Capital Punishment*, 1967.

WEST, LOUIS JOSLYN, Psychiatrist, Professor and head of Department of Psychiatry, Neurology and Behaviorial Sciences, University of Oklahoma School of Medicine; Fellow, Center for Advanced Study in the Behaviorial Sciences, Stanford, California, 1966-67; Major, U.S. Air Force, Chief of the Psychiatry Service, Lackland Air Force Base Hospital, San Antonio, Texas, 1952-56; National Consultant in Psychiatry to Surgeon General of the Air Force, 1958-63; Past President, Southern Professors of Psychiatry; member, Society for Psychophysiological Research, Pavlovian Society, American Association for the Advancement of Science.

IN THE

Supreme Court of the United States

October Term, 1971

No. 68-5027

EARNEST JAMES AIKENS,

v.

STATE OF CALIFORNIA,

Respondent.

No. 69-6003

WILLIAM HENRY FURMAN,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

No. 69-5030

LUCIOUS JACKSON,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

No. 69-5031

ELMER BRANCH,

Petitioner,

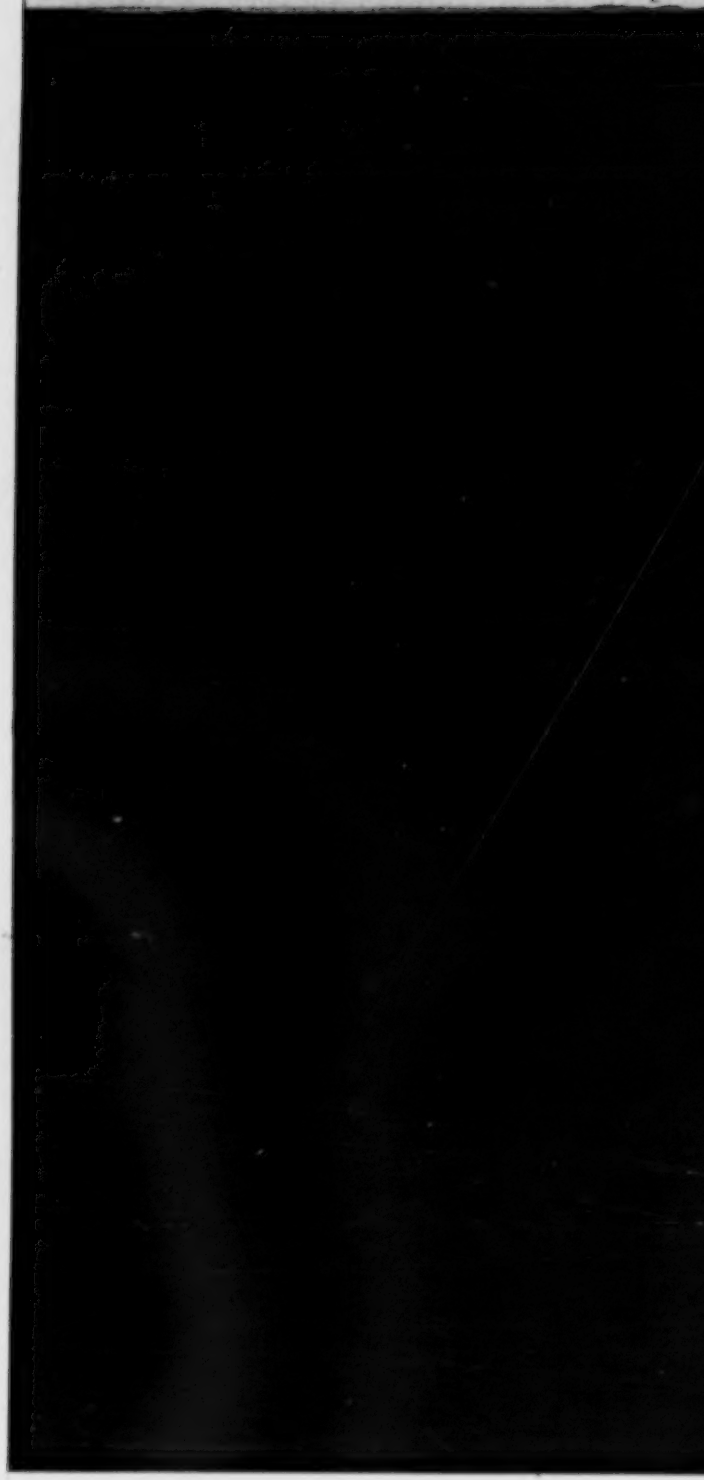
v.

STATE OF TEXAS,

Respondent.

BRIEF *AMICI CURIAE* AND MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF THE SYNAGOGUE COUNCIL OF AMERICA AND ITS CONSTITUENTS (THE CENTRAL CONFERENCE OF AMERICAN RABBIS, THE RABBINICAL ASSEMBLY OF AMERICA, THE RABBINICAL COUNCIL OF AMERICA, THE UNION OF AMERICAN HEBREW CONGREGATIONS, THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, THE UNITED SYNAGOGUE OF AMERICA) AND THE AMERICAN JEWISH CONGRESS

LEO PFEFFER
15 East 84th Street
New York, New York 10028
(212) TR 9-4500
Attorney for *Amici Curiae*



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IN THE

Supreme Court of the United States

October Term, 1971

No. 69-5031

ELMER BRANCH,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF THE SYNAGOGUE COUNCIL OF AMERICA AND ITS CONSTITUENTS (THE CENTRAL CONFERENCE OF AMERICAN RABBIS, THE RABBINICAL ASSEMBLY OF AMERICA, THE RABBINICAL COUNCIL OF AMERICA, THE UNION OF AMERICAN HEBREW CONGREGATIONS, THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, THE UNITED SYNAGOGUE OF AMERICA) AND THE AMERICAN JEWISH CONGRESS

The undersigned as attorney for the *amici curiae* herein respectfully moves this Court for leave to file the attached brief *amici curiae* in the case of *Branch* v. *State of Texas,* No. 69-5031.

Consent to file this brief *amici* has been received from counsel on both sides in *Aikens* v. *California,* No. 68-5027, *Jackson* v. *Georgia,* No. 69-5030, and *Furman* v. *Georgia,* No. 69-5003. The Attorney General of Texas, however, has refused to consent to our filing this brief in *Branch.* Accordingly, this motion is made for that purpose.

The interest of the *amici curiae* and the reason for the making this motion are set forth on pages 4-7 of the annexed brief. We respectfully refer the Court thereto.

We note, further, that the *amici* herein have previously filed a brief in *Maxwell* v. *Bishop*, 398 U. S. 262 (1970). However, the issue of the validity of capital punishment under the Eighth Amendment was not reached in that case and accordingly we respectfully pray for leave to file the attached brief.

This brief seeks to introduce a factor which it is believed is not fully presented in the parties' briefs. It seeks to stress that the unacceptability of the death penalty, which establishes its invalidity under the Eighth Amendment, is not merely an American phenomenon but one expressing universal values. This is manifested by the expression ranging from the *de facto* abolition of the death penalty by the Rabbis in Talmudic times two thousand years ago to the current studies and reports of the United Nations. We argue that a decent respect for the opinions of mankind impels a constitutional declaration by this Court that the law of the land is consistent with the universal unacceptability of the death penalty.

September, 1971

Respectfully submitted,

LEO PFEFFER
15 East 84th Street
New York, New York 1002
(212) TR 9-4500
Attorney for *Amici Curiae*

IN THE

Supreme Court of the United States

October Term, 1971

No. 68-5027

EARNEST JAMES AIKENS,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

No. 69-6003

WILLIAM HENRY FURMAN,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

No. 69-5030

LUCIOUS JACKSON,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

No. 69-5031

ELMER BRANCH,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

BRIEF *AMICI CURIAE* OF THE SYNAGOGUE COUNCIL OF AMERICA AND ITS CONSTITUENTS (THE CENTRAL CONFERENCE OF AMERICAN RABBIS, THE RABBINICAL ASSEMBLY OF AMERICA, THE RABBINICAL COUNCIL OF AMERICA, THE UNION OF AMERICAN HEBREW CONGREGATIONS, THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, THE UNITED SYNAGOGUE OF AMERICA) AND THE AMERICAN JEWISH CONGRESS

Interest of the *Amici*

Four cases bring to this Court for the first time the direct question of the constitutionality of capital punishment. Two of the cases, *Aikens* v. *California,* No. 68-5027, and *Furman* v. *Georgia,* No. 69-5003, involve imposition of the death penalty for murder; in the other two, *Jackson* v. *Georgia,* No. 69-5030, and *Branch* v. *Texas,* No. 69-5031, the death penalty was imposed for non-homicidal rape. Because the *amici,* as Jewish religious and civic organizations, have a special interest in the subject of capital punishment and a deep concern regarding the sanctity of human life, they submit this brief *amici curiae.** In doing so, however, they note that this brief is not addressed to the question of capital punishment for international crimes such as genocide.

The Synagogue Council of America is the coordinating body of American Judaism. Its six constituents are the recognized rabbinic and congregational representatives of the three branches of American Judaism—Orthodox, Conservative and Reform.

The American Jewish Congress is an association of American Jews organized to oppose racial and religious discrimination and to help preserve democratic values, principles and practices.

All of the *amici* are opposed as a matter of principle to the imposition of the death penalty and support its abolition. Their position is based on their judgment as to the demands of contemporary American democratic standards, but also has its roots in ancient Jewish tradition. This statement may seem surprising in view of the many refer-

* The *amici* filed a brief in *Maxwell* v. *Bishop,* 298 U.S. 262 (1970), but the issue was not reached in that case.

ences in the Hebrew Bible to the death penalty for such transgressions as adultery (Lev. 20:21), bestiality (Ex. 22:18), murder (Ex. 21:12) and rape of a betrothed woman (Deut. 22:15). Indeed, these Scriptural provisions are often invoked by defenders of capital punishment.[1]

These statements, however, reflect an unfamiliarity with the full Jewish tradition, and specifically with the fact that Rabbinic Judaism during the Talmudic period, some two thousand years ago, represents the interpretation and implementation of the Scriptural command. We can fully understand the Scriptures only through their presentation by the Oral Law, of which Talmud is the prime exponent.

The definition and the application of the laws of evidence and criminal procedure in the Talmud made conviction in a capital case practically impossible. Thus, for example, it is noted that if an accused were to be convicted in a capital case the verdict could *not* be unanimous, the reasoning of the Rabbis being that if not a single one of the twenty-three judges constituting the court (*Sanhedrin*) could find some reason for acquittal there was something fundamentally wrong with the court. Circumstantial evidence was not sufficient to sustain a verdict in a capital case; two eyewitnesses, subjected to rigorous cross-examination by the court, were required. Moreover, to assure that the act had been committed with full premeditation, both witnesses had to testify that they warned the accused *before* the crime that the act was prohibited and what its penal consequences were. (*Talmud, Sanhedrin*, 40b, *et seq.*)

1. See e.g., Vellenga, CHRISTIANITY AND THE DEATH PENALTY; in Bedau, THE DEATH PENALTY IN AMERICA, 124-125 (1967) (hereinafter referred to as Bedau); Hoover, STATEMENTS IN FAVOR OF THE DEATH PENALTY, in *ibid.*, 1933.

In view of these procedural requirements it is evide that conviction in a capital case was virtually impossible But perhaps most indicative of the Rabbinic view of cap ital punishment is the following from the Talmud (*Makko* Chap. 1, Mishnah 7):

> A *sanhedrin* which executes a criminal once in seve years is called a "court of destroyers." Rabbi Elie zer ben Azariah states that this is so even if it exe cutes one every seventy years. Rabbi Tarphon an Rabbi Akiba stated that if they had been members o the sanhedrin no one would ever have been executed

One Rabbi, Simeon ben Gamliel, expressed a contrary view, reflecting the most common justification for capital punishment, namely its deterrent effect. If the views of Rabbi Tarphon and Akiba were to prevail, he said, "they would increase murders in Israel." However, later com mentaries note that Rabbi Simeon's was a minority view and that the others expressed the normative opinions of the Rabbis. (Maimonides, *Hilkoth Sanhedrin*, xiv, xv.)

To take a human life, the Rabbis said, is matter of the gravest seriousness. Execution is not reversible. If a mis take is made what has been done cannot be undone. One who takes a human life, they pointed out, diminishes the Divine Image. On occasions, this extreme means may be necessary to protect society. But it may be carried out only when there can be absolutely no doubt concerning the guilt of the accused and of his freely chosen, deliberate and knowing act. In view of human fallibility which is so pervasive a factor in all judgments, a drastic step such

2. "It is clear that with such a procedure conviction in capital cases was next to impossible, and that this was the intention of the framers of the rule is equally plain." 2 Moore, JUDAISM, 186 (1927).

as terminating a human life was as a practical matter not defensible. (See, 3 JEWISH ENCYCLOPEDIA 554-558 (1912); Mendelsohn, CRIMINAL JURISPRUDENCE OF THE ANCIENT HEBREWS, 116-133.)[3]

Summary of Argument

Under the Eighth Amendment to the Federal Constitution, made applicable to the states by the Fourteenth, a state may not impose punishment which is cruel or unusual. The ultimate responsibility of determining whether punishment is cruel or unusual rests not with the legislature but with the courts, and ultimately of course this Court. In discharging this responsibility the Court is not restricted to standards prevailing in 1789 when the Amendment was framed but should apply contemporary standards. Nor should these standards be limited by considerations of geographic regionalism, but should give weight to national and even international judgments. Moreover, it should consider the efficacy or inefficacy of the death penalty as a deterrent and should give weight to the usual if not inevitable concomitants of imposition of the death penalty, such as unequal and racially discriminatory imposition. Measured by these standards the death penalty constitutes cruel and unusual punishment within the meaning of the Eighth Amendment, and certainly so in cases of non-homicidal rape.

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3. It is for this reason that Lafayette vowed to oppose capital punishment until "the infallibility of human judgment" was demonstrated to him. Quoted in statement by Attorney General Ramsey Clark before Subcommittee on Criminal Laws and Procedures of the United States Senate on S. 1760, To Abolish the Death Penalty, July 2, 1968 (hereinafter referred to as Statement on S. 1760).

ARGUMENT

Imposition of the death penalty constitutes cr and unusual punishment in violation of the Eig Amendment as made applicable to the states by Fourteenth, and especially so in cases of non-homici rape.

A. The Constitutionality of the Death Penalty in Gene

The unconstitutionality of the death sentence in all ca is being increasingly suggested among legal writers,[4] merely under the Eighth Amendment but as a denial due process. Under the former it has been suggested th contemporary scientific knowledge, not available in 17 but requiring judicial recognition,[5] establishes that methods of execution of humans in use in the world tod (hanging, shooting, beheading, stoning, electrocution a gas asphyxiation)[6] are physically and psychologically pai ful to the extent of being cruel and inhumane. Marcus a Weisbrodt, *The Death Penalty Cases*, 56 CALIF. L. R 1268, 1326-1343 (1968). It has been urged too that, as t then Attorney General of the United States stated in 19 "Surely the abolition of the death penalty is a major mil stone in the long road from barbarism,"[7] and that accor

4. Rubin, *The Supreme Court, Cruel and Unusual Punishme and the Death Penalty*, 15 CRIME AND DELINQUENCY 121 (1969 Marcus and Weisbrodt, *The Death Penalty Cases*, 56 CALIF. L. R 1268 (1968); Gottlieb, *Testing the Death Penalty*, 34 S. CALIF. L 268 (1961); Goldberg and Dershowitz, *Declaring The Death Pena Unconstitutional*, 83 HAR. L. REV. 1773 (1970).

5. Cf. *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

6. Reckless, *The Use of the Death Penalty*, 15 CRIME AND D LINQUENCY 43, 46 (1969).

7. Statement on S. 1760.

ingly by contemporary standards this Court can and should declare capital punishment to be unconstitutionally cruel and inhumane in all cases. (See Point II of Brief Amicus Curiae of the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent in *Boykin* v. *Alabama*, 395 U.S. 238 (1969).)

It may also be suggested that, as will be indicated below (pp. 37-38), actual consummation of the death penalty even when it is imposed has become so rare that *de facto* if not *de jure* it has become "unusual" within the context of the Eighth Amendment and that the Court should declare it so.

The due process argument has been predicated on the claim that execution of the death penalty renders due process of law inoperable. "When the condemned man is executed, errors in the proceedings are placed beyond the reach of later decisions that would provide new grounds for examining whether the proceedings leading to the execution contained error." Rubin, *The Supreme Court, Cruel and Unusual Punishment and the Death Penalty*, 15 CRIME AND DELINQUENCY 121, 130 (1969). Thus, for example, in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968) the Court held that a jury from which persons not believing in the death penalty were excluded was not representative of the community and therefore constitutionally impermissible. The Court held this principle to be retroactive and hence applicable to all persons in death rows all over the country. But as to those who have already been executed reopening and retrial is of course impossible and therefore the inevitable result is that they have been deprived of their lives without due process of law.

Finally, an argument has been made which encompasses both due process and the Eighth Amendment, an argument suggested by *Robinson* v. *California*, 370 U.S. 660 (1962), that the death penalty is not rationally related to any purpose that an American government may constitutionally seek to achieve. The traditional purposes of punishment have been retribution, deterrence, reform, and isolation for the protection of the community. *Rudolph* v. *Alabama*, 375 U.S. 889 (1963), dissenting opinion of Mr. Justice Goldberg; Holmes, THE COMMON LAW (Howe, ed.) 36 (1963). Retribution, it is asserted, is today no longer a valid governmental interest.[8] Capital punishment, as will be indicated more fully below, is overwhelmingly adjudged by competent students not to be demonstrably more effectual as a deterrent than life or long-term imprisonment. Reformation is of course impossible, and isolation can be effectively achieved by confinement. Gottlieb, *Testing the Death Penalty*, 34 S. CALIF. L. REV. 268 (1961); Sellin, *The Death Penalty* 69-79 (1959).[9]

B. Applicability of the Eighth Amendment to the States

Whatever doubts may have previously existed,[10] it is now clear that the Eighth Amendment's prohibition of cruel and unusual punishment is applicable to the states

8. "There is no place * * * for punishment for its own sake, the product of vengeance or retribution." *People* v. *Oliver*, 1 N.Y. 2d 152, 160 (1956). See also Holmes, THE COMMON LAW (Howe, ed.) 37 (1963); Marcus and Weisbrodt, *The Death Penalty Cases*, 56 CALIF. L. REV. 1268, 1348-1354 (1968).

9. Of course, execution is more economical than life confinement, but in view of the sanctity of human life it can hardly be contended that this fact should be determinative.

10. See *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 462 (1947).

by virtue of the Fourteenth Amendment. *Robinson* v. *California*, 370 U.S. 660, 666 (1962); *Gideon* v. *Wainwright*, 372 U.S. 341-342 (1963); *Ralph* v. *Warden*, 438 F. 2d 786 (C.A. 4, 1971), petition for certiorari filed, 40 LW 3058 (1971).

C. Judicial Responsibility

Although, as will be indicated more fully below, there is a steady legislative trend toward the abolition of the death penalty either altogether or with a few exceptions (*infra*, p. 36), a trend which reflects the mandate of the public conscience, the ultimate responsibility of determining what constitutes cruel and unusual punishment within the meaning of the Eighth Amendment rests not with the legislature but with the courts, and particularly this Court. *Trop* v. *Dulles*, 356 U.S. 86, 103 (1958); *Robinson* v. *California*, *supra*. Representative Livermore stated this clearly and succinctly in arguing against the Amendment in Congress: "It lays with the court to determine." (*Cong. Register* 225, quoted in *Weems* v. *United States*, 217 U.S. at 369). As we indicate below (p. 18), *Gitlow* v. *New York*, 268 U.S. 652 (1925) and the innumerable cases following it, hold that the effect of the Fourteenth Amendment is to universalize the Bill of Rights and to require all states and localities to adhere to national standards of freedom, justice and equality. Whether or not the fifth section of that Amendment empowers the Congress to forbid capital punishment by the states, its failure to act cannot, unless *Marbury* v. *Madison*, 1 Cranch 137 (1803) no longer has any meaning, affect the ultimate responsibility of this Court to interpret and apply the Bill of Rights nationally.

D. Excessive Punishment as Cruelty[11]

Rather surprisingly it has been urged that the inten of the Eighth Amendment is solely to forbid cruel and in humane methods of punishment such as torture or burn ing at the stake, but not to forbid punishments which ar wholly disproportionate to the offense committed. *Weem* v. *United States*, 217 U.S. 349, 382 (1910) (dissenting opin ion); Packer, *Making the Punishment Fit the Crime*, 7 HARV. L. REV. 1071, 1074-1075 (1964). This is surprising because it would forbid flogging a person who committe petty larceny[12] or even fining him excessively (since th Amendment specifically prohibits excessive fines),[13] but no imprisoning him for life or even hanging him for it.[14]

It is difficult to believe that the framers and adopter of the Amendment were concerned only about disproportionate monetary punishment but not other and more seri ous forms of disproportionate punishment.

In any event, the issue is no longer open to question; it is clear today that punishments which are excessively disproportionate to the crimes for which they are imposed

11. This Section of our Brief pertains only to *Jackson* v. *Georgia* and *Branch* v. *Texas*.

12. *Jackson* v. *Bishop*, 404 F.2d 571 (1968).

13. The Eighth Amendment was taken bodily from the English Bill of Rights of 1688 (1 W. & M. s. 2, c. 2). The earliest applica tion of the provisions in England appears to have been in 1689, just a year after its adoption, in a case in which the King's Bench fined Lord Devonshire thirty thousand pounds for an assault and battery upon Colonel Culpepper. The House of Lords, in reviewing the case, took the opinion of the law Lords, and decided that the fine "was excessive and exorbitant, against Magna Charta, the common right of the subject and the law of the land." *Weems* v. *United States*, *supra*, 217 U.S. at 376.

14. See below footnote 23.

are cruel and unusual within the meaning of the Amendment. *Weems* v. *United States, supra*; *Robinson* v. *California, supra*; *Ralph* v. *Warden, supra*. It follows from this that even if the Court cannot find that there is no uncruel or humane method of execution of the death penalty[15] and is not prepared at present to hold that the death penalty is in all cases disproportionate to all crimes even those resulting in death, it can, and we submit should hold that it is unconstitutionally disproportionate to the crime of rape which does not result in death.

In discharging its responsibility of interpreting and applying the Eighth Amendment the Court is not confined to the standards prevailing in 1789 when the Amendment was framed. "[T]he words of the Amendment are not precise * * * their scope is not static." *Trop* v. *Dulles*, 356 U.S. at 100-101. Even when the Amendment was debated in Congress on its introduction it was recognized that future courts would give different meanings to the term "cruel." Representative Livermore opposed the Amendment for exactly that reason, stating:

> The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lays with the court to determine; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we, in future, to be prevented from inflicting these punishments because they are cruel?

15. *Wilkerson* v. *Utah*, 99 U.S. 130 (1878) (statute authorized trial judge option of sentencing death by shooting, hanging or beheading; Court held shooting is not cruel and unusual); *In re Kemmler*, 136 U.S. 436 (1890) (death by electrocution not cruel and unusual). See also *O'Neil* v. *Vermont*, 144 U.S. 323 (1892).

> If a more lenient mode of correcting vice and de
> ring others from the commission of it could be
> vented, it would be very prudent in the legislature
> adopt it, but until we have some security that this
> be done, we ought not to be restrained from mak
> necessary laws by any declaration of this kind. (Co
> Register 225, quoted in *Weems* v. *United States,*
> U.S. at 369).[16]

Livermore spoke of cutting off the ears of crimina but lest it be assumed that this was merely the product his imagination, it should be noted that the Constituti itself, or more specifically the Fifth Amendment, appea to contemplate the acceptability of dismemberment as method of punishment. The Amendment provides that person shall "be subject for the same offense to be twi put in jeopardy of life or limb," thus implying the pr priety of being *once* put in jeopardy of limb.[17] Blackstor refers to drawing and quartering, disemboweling, behea ing and branding as forms of punishment practiced in En land, notwithstanding the Bill of Rights of 1688, up to time contemporary with the framing of the Eighth Amen ment.[18] Can it be doubted that no American court woul today sanction these methods of punishment in the fa of the Eighth Amendment?[19]

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16. It is interesting to note that Livermore apparently anticipate a time when hanging, and presumably all other methods of executin the death penalty, would be adjudged unconstitutionally cruel.

17. Gottlieb, *Capital Punishment,* 15 CRIME AND DELINQUENC 1, 20 1969).

18. 2 Blackstone, COMMENTARIES, 2620-23 (Jones' ed. 1916) Whipping, held violative of the Eighth Amendment in *Jackson* v *Bishop,* 404 F. 2d 571 (1968), was specifically prescribed as punish ment for a variety of offenses in the first Federal Crimes Act, 1 Sta 112-117.

19. See, *Wilkerson* v. *Utah,* 99 U.S. 130, 135-136 (1878).

E. Inapplicable Standards of Cruelty[20]

As we have indicated, the Amendment addresses itself not only to the method of punishment but to its proportionateness as well. It no more immunizes from future judicial review punishment deemed in 1789 not to be disproportionate or excessive by the standards then prevailing than it immunizes punishments then acceptable in method or mode of execution. As late as 1837, more than twenty-five offenses, including stealing bank notes, forgery and bigamy were punishable by death in North Carolina.[21] In England, it was not until 1810 that the law making picking pockets a capital offense was repealed.[22] The Crimes Act of 1790 (1 Stat. 112-117), the first Federal penal code, made forging or passing forged public securities punishable by death.

It is inconceivable that this Court would today allow the death penalty to be imposed for these crimes although they were apparently acceptable to the generation that framed and adopted the Eighth Amendment. That Amendment did not fossilize forever the standards of humane conduct prevailing in the 18th century. The matter has been well put by the Court in *Weems* v. *United States* (217 U.S. at 373):

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily

20. This Section of our Brief pertains particularly to *Jackson* v. *Georgia* and *Branch* v. *Texas*.

21. Bedau, 7. This harsh code persisted so long in North Carolina partly because the state had no penitentiary and thus had no suitable alternative to the death penalty. *Ibid.*

22. *Ibid.*

confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their case and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction. * * *

The conclusion to be drawn from this is that the fact that death was deemed a constitutionally acceptable penalty for rape in 1789 when the Eighth Amendment was framed, or 1868 when the Fourteenth Amendment was adopted or even in 1947 when *Louisiana ex rel. Francis* v. *Resweber* was decided by this Court, does not require the Court to hold today that it is constitutionally acceptable and not violative of the Eighth Amendment. As the Court said in *Weems* (217 U.S. at 378), "The clause of the Constitution * * * may therefore be progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."

Nor is the Court precluded from adjudging the death penalty to be unconstitutionally inappropriate or excessive by reason of the fact that the legislature has expressly or implicitly found it to be efficacious as a deterrent. As we will show below (p. 27), the scientific evidence is almost unanimously to the contrary; but even if that were not so, the Eighth Amendment does not except from its prohibition such cruel and inhumane punishment as effectively deters others from committing the same crime. If it did, there would be nothing left of the Amendment, for the more cruel the punishment the more effective it would be as a deterrent. Concededly, the state has an interest in deterring murder and rape. But so too does it have an interest in deterring forgery, embezzlement, petty larceny and even traffic violations, and that interest would hardly constitutionally justify imposition of the death penalty for those offenses.[23]

Today, 17 states and the District of Columbia maintain in their statutes the death penalty for rape.[24] All but one

23. "But, indeed, were capital punishments proved by experience to be a sure and effectual remedy, that would not prove the necessity * * * of inflicting them upon all occasions when other expedients fail. I fear this reasoning would extend a great deal too far. For instance, the damage done to our public road by loaded wagons is universally allowed, and many laws have been made to prevent it; none of which have hitherto proved effectual. But it does not therefore follow that it would be just for the legislature to inflict death upon every obstinate carrier who defeats or eludes the provisions of former statutes * * *" 2 Blacktone's *Commentaries*, 2164-65. (It should be noted, incidentally, that this quotation effectively disposes of the claim that the term "cruel and unusual" as used in the Bill of Rights of 1688 contemplated only the method of punishment and not its appropriateness or excessiveness.)

24. The states are Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Tennessee, Texas and Virginia. Bedau, p. 43; United Nations Report, Capital Punishment

(Nevada) are southern states.[25] The death penalty for rape can therefore truly be said to be a regional or geographic phenomenon. But, we submit, a geographic or regional variation cannot restrict the Court's exercise of judgment in construing and applying the Eighth Amendment any more than the First or Fourteenth. Indeed, whether or not it was the intent of the framers of the latter amendment to incorporate the first ten,[26] the practical effectuation of the same result through the steady process of selective incorporation initiated in *Gitlow* v. *New York, supra,* manifests a strong judicial policy towards nationalizing the Bill of Rights. During the almost half-century since *Gitlow,* the personnel of the Court has undergone many changes; it has included such staunch defenders of federalism as Mr. Justice Frankfurter. Yet, during the entire period the progress towards nationalization has not been stayed and certainly not been reversed; not a single decision holding applicable to the states by virtue of the Fourteenth Amendment a right secured in the first ten has been overruled by the Court or even modified to the extent of according greater liberality to the states in interpreting the scope of the right.[27]

(ST/SOA/SD/9-10), p. 40 (hereinafter referred to as UN Report). The latter includes West Virginia but in 1965, after the UN compilation, that state abolished capital punishment in all cases. United States Department of Justice, National Prisoner Statistics, No. 42, June, 1968, p. 32 (hereinafter referred to as NPS). In Nevada, rape is punishable by death only where committed with substantial bodily harm to the victim. Nev. Rev. Stat. Sec. 200.363 (1967).

25. So classified by the Department of Justice. NPS, p. 9.

26. See *Adamson* v. *California,* 332 U.S. 46 (1947) (opinion by Mr. Justice Reed, concurring opinion by Mr. Justice Frankfurter and dissenting opinion by Mr. Justice Black).

27. As suggested by Mr. Justice Jackson in *Beauharnais* v. *Illinois,* 343 U.S. 250, 288-295 (1952) and Mr. Justice Harlan in *Roth* v. *United States,* 354 U.S. 476 (1957).

The principle underlying *Gitlow* and its successors is that we are one indivisible nation with liberty and justice for all, and not merely for those fortunate enough to reside in some rather than other regions of the country. It is the principle that where the fundamental freedoms of the Bill of Rights are concerned (one of which is the freedom from cruelly excessive punishments) accidents of geography are irrelevant. So long as we are one nation, it is unacceptable that the right of a man, even a rapist, to live should depend on whether he committed the offense five feet north or five feet south of the Mason-Dixon line.

It is not merely in the many incorporation cases that the judicial policy negating geographical factors in applying constitutional freedoms is manifest. In *Brown* v. *Board of Education, supra,* the Court held that a Negro child attending public school in Topeka, Kansas, has as much right not to be segregated as his cousin attending school in Denver or Minneapolis. In *Loving* v. *Virginia,* 388 U.S. 1 (1967), it held that the right of a Negro and white to marry each other is not dependent on whether they live in Richmond or in New York.

The thrust of *Baker* v. *Carr,* 369 U.S. 186 (1962) and its manifold progeny is that not only the right to vote but the value of one's vote may not be made dependent upon the geographical accident of whether he lives on a farm or in a city.

Perhaps most germane is *Jacobellis* v. *Ohio,* 378 U.S. 184 (1964). In *Roth* v. *United States,* 354 U.S. 476, 489 (1957), this Court had held that the test for constitutionally unprotected obscenity is "whether to the average person,

applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests." In *Jacobellis*, the Court held that the term "community standards" does not imply a determination of the constitutional question of obscenity in each case by the standards of the particular community from which the case arises, but that it refers to national rather than local standards. What the Court said in *Jacobellis* is, we submit, particularly relevant here (378 U.S. at 194-5):

> It is true that local communities throughout the land are in fact diverse, and that in cases such as this one the Court is confronted with the task of reconciling the rights of such communities with the rights of individuals. Communities vary, however, in many respects other than their toleration of alleged obscenity, and such variances have never been considered to require or justify a varying standard for application of the Federal Constitution. The Court has regularly been compelled, in reviewing criminal convictions challenged under the Due Process Clause of the Fourteenth Amendment, to reconcile the conflicting rights of the local community which brought the prosecution and of the individual defendant. Such a task is admittedly difficult and delicate, but it is inherent in the Court's duty of determining whether a particular conviction worked a deprivation of rights guaranteed by the Federal Constitution. The Court has not shrunk from discharging that duty in other areas, and we see no reason why it should do so here. The Court has explicitly refused to tolerate a result whereby "the constitutional limits of free expression in the Nation would vary with state lines," *Pennekamp* v. *Florida*, *supra*, 323 U.S., at 335, we see even less justification for allowing such limits to vary with town or county lines. We thus reaffirm the position taken in Roth to the effect that the

> constitutional status of an allegedly obscene work must be determined on the basis of a national standard. *It is, after all, a national Constitution we are expounding.* (Emphasis added.)

If a community may not determine for itself what is obscene, it may not determine what is cruel and unusual. If restrictive local or regional standards may not determine the right of an American to speak, it certainly may not, we submit, determine his right to live.

It may be conceded that these decisions as well as one that forbids a state to impose the death penalty impinge somewhat upon federalism strictly construed. But federalism, like government, is not an end but a means. We declared our independence of England because we believed that governments are instituted among men to secure their inalienable rights, of which first and foremost is the right to live, and that when a particular form of government fails to secure these rights, it is the form of government and not the rights which must yield.

It is no answer to say that application to particular geographic regions of national concepts of the meaning of freedoms secured by the Bill of Rights should be effected by constitutional amendment rather than court decision, for it is the teaching of all the post-*Gitlow* decisions that this indeed is what was done in 1868. If the Fourteenth Amendment means anything, it means that a man's right to life or liberty cannot be made dependent upon local or regional standards but must be judged according to the standards of the entire nation. It is, after all, a national Constitution which secures this right.

F. Applicable Standards of Cruelty

As we have indicated, the ultimate authority to determine what constitutes constitutionally impermissible punishment rests with the courts. This is so because in a Federal system based upon a written constitution there must be some single agency which has the final responsibility of determining for the whole nation the meaning of that constitution. Ever since *Marbury* v. *Madison*, 1 Cranch 137 (1803), it has been established that this responsibility has been delegated to the judiciary. It is therefore the responsibility of this Court to adjudicate the appropriateness of the death penalty today as punishment which is not cruel and unusual.

In discharging this responsibility, members of the Court are not left without guides other than their own subjective predispositions. We do not urge the Court to reverse in the present cases merely because its members may not like the idea of a human being deliberately being put to death by a democratic government. We do not even urge that the penalty be adjudged unconstitutional because the Court deems it shocking to their own conscience, although there is ample authority for this.[28] We believe that there are standards or criteria available to the Court as reasonably objective as can be expected of a constitutional provision whose words necessarily "are not precise."[29]

We have heretofore urged rejection of such criteria as acceptability in 1789 or 1868, effectiveness as a deterrent,

28. *See, e.g., Rochin* v. *California*, 342 U.S. 165 (1952); *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 471 (1947) (concurring opinion of Mr. Justice Frankfurter).

29. *Trop* v. *Dulles*, 356 U.S. at 100.

and contemporary acceptability in a particular geographic region. There are, however, other standards or criteria which are appropriate and it is to these that we now address ourselves.

Preliminarily, we note that the over-all principle was expressed by Mr. Chief Justice Warren in his plurality opinion in *Trop* v. *Dulles* (356 U.S. at 101). "The Amendment," he said, "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." The criteria we now propose will, we submit, aid the Court in determining whether the death penalty is consistent with these "evolving standards of decency."

1. The cruelty of deterrent punishment

We have pointed out above (p. 17) that punishment may be excessive and hence constitutionally cruel even if it is effective as a deterrent; indeed, we noted, if punishment is a deterrent the more excessive the punishment the more likely it is to be effective as a deterrent. The gas chamber for litterers may be the most effective way of keeping the streets clean, but that is a price for clean streets the Eighth Amendment does not permit government in the United States to pay.

Excessiveness, however, is not limited to non-homicidal crimes. Certainly, the death penalty for negligently caused homicide would not be adjudged acceptable today under the Eighth Amendment. But even in cases of deliberately and premeditatedly committed murder the Eighth Amendment is operative. Even Professor Packer[30] would not hold that

30. *Op. cit.* p. 12.

in every respect "*Making the Punishment Fit the Crime*" accords with Eighth Amendment limitations, else it would be constitutional to burn homicidal arsonists at the stake.

Those who wrote and those who adopted the Eighth Amendment undoubtedly shared the common assumption that punishment was an effective deterrent of crime and that the more severe the punishment the more effective it was likely to be as a deterrent. They were aware that punishments such as torture, burning, disembowelment and dismemberment had long been deemed acceptable and efficacious means of deterring crime. In adopting the Eighth Amendment they made a deliberate judgment that even deterrence of homicidal crimes may not be purchased at a price which violated what they judged to be America's standards of civilization and humaneness. Just as they made the decision that domestic tranquility should not be purchased at the cost of suppressing dissent, so too they decided that it should not be purchased at the cost of humaneness and respect for the sacredness and integrity of the individual, even if he himself were a cruel and inhumane murderer.

But, as our quotation from Livermore[31] shows, they did not intend to freeze for all times their own standards of civilization and humaneness, any more than they were willing to accept for themselves the standards of preceding generations that allowed execution of the death penalty by means of torture and disembowelment. And, as the same quotation indicates, they assumed that it would be the judges in each generation who in the final analysis would

31. *Supra*, p. 13.

determine the limits allowed by contemporary standards of civilization and humaneness.

This Court has accepted the responsibility of determining whether a particular form of executing the death penalty does violence to such standards. *Wilkerson* v. *Utah*, 99 U.S. 130; *In re Kemmler*, 136 U.S. 436 (1890); *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459 (1947). We submit that it can and should determine whether any form of executing the death penalty is consistent with our present standards of civilization and humaneness. If it finds, as we believe it should, that it is not, it should declare the death penalty unconstitutionally cruel and unusual in all cases, even though it also believes that it is an effective deterrent to homicidal crimes.

2. *The cruelty of non-deterrent punishment*

The fact that punishment may be unconstitutionally cruel even if it is effective as a deterrent does not mean that conversely its noneffectiveness as a deterrent is constitutionally irrelevant. We suggest, rather, that punishment which does not deter and does not serve any valid purpose at all (such as reformation) or any valid purpose which cannot effectively be served by less harsh means (such as isolation) is cruel and inhumane. This is so because its only purpose is vengeance,[32] and vengeance is forbidden by the Constitution.

32. There is considerable empiric evidence to support the belief that vengeance is the purpose of the death penalty. Prison authorities uniformly search and guard condemned prisoners closely to prevent suicide. Should a prisoner in attempting suicide injure himself, no medical effort is spared to keep him alive for the scheduled execution. Gottlieb, *Capital Punishment*, 15 CRIME AND DELINQUENCY 8 (1969). It is apparently not the prisoner's death but the putting him

Mr. Justice Brennan did not join in the Chief Justice's plurality opinion in *Trop* v. *Dulles*, but he expressed this principle well in his own concurring opinion. After concluding that denationalization for desertion during wartime is ineffective as a deterrent, he stated (356 U.S. at 112):

> • • • It cannot be denied that there is implicit in this a certain rough justice. He who refuses to act as an American should no longer be an American—what could be fairer? But I cannot see that this is any-

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to death that the state demands. Moreover, the prisoner must be conscious and sane at the time of the execution. Dr. William F. Graves, for many years medical officer at San Quentin, made some fifty visits on death row, examining each condemned inmate to determine his physical and mental status and to recommend any treatment that might be needed to keep him alive and sane for execution. Dr. Graves reports as follows regarding one condemned prisoner: "During his stay in Death Row, McCracken became no more than a vegetable. On one occasion, I found him wallowing on the floor of his cell in his own excreta babbling incoherently. I arranged to have him transferred to the prison hospital where he was given electric shock therapy—this to bring him to a point of sanity at which he might be considered able to understand that he was being punished at the time of his execution." *Ibid.*

That this practice is not limited to the United States is shown by the following from the UN report cited above (at p. 101): "There are provisions in the laws of many countries which allow the postponement of an execution in the event of either serious physical illness or insanity which appears after sentencing; the execution then takes place when the condemned man is in good health. Ironically, this practice sometimes results in the fact that the state expends considerable effort and funds to save the life of the man it will then proceed to kill. * * *" All this makes sense only in terms of vengeance; the culprit must be sane and conscious when the state puts him to death, else the state's vengeance would not be full.

The practice in ancient Israel, during the time when capital punishment was still effected, was the reverse. The condemned prisoner was given wine spiced with frankincense to drink in order to benumb his senses. *Talmud, Sanhedrin* 43a.

thing other than forcing retribution from the offender —naked vengeance. • • •

Mr. Justice Brennan did not join in the plurality opinion based on the Eighth Amendment presumably because the Government had "understandabl[y] • • • not pressed its case on the basis of expatriation of the deserter as punishment for his crime." (*Ibid.*) Had it done so, the tenor of his opinion and his joinder in the Court's opinion in *Robinson* v. *California, supra,* indicate quite clearly that he would likewise have held that non-deterrent, vengeful punishment is violative of the Eighth Amendment's prohibition of cruel and unusual punishment.

Mr. Justice Brennan pointed out in *Trop* that because of the novelty of expatriation as punishment no one can judge its precise consequences and he accordingly could not rely on any studies to establish its inefficacy as a deterrent.[33] Nevertheless, he concluded that since its efficacy had not been established, so grave a penalty could not constitutionally be imposed by Congress.

In respect to capital punishment, however, substantial studies have been made by competent scholars and their conclusion is overwhelming that statistical research does not support the assumption that the death penalty is more effective as a deterrent than life or long-term imprisonment and that it is the certainty rather than the gravity

33. He did, however, note that, from the fact that in two-thirds of the cases of the 21,000 soldiers convicted of desertion during World War II and sentenced to be dishonorably discharged reviewing authorities remitted the dishonorable discharges, "it is possible to infer that the military itself had no firm belief in the deterrent effects of expatriation." 356 U.S. at 112, n. 8.

of the punishment that is critical in deterrence.[34] (Indee
the only contrary assertions are unsupported, impressio
istic statements mainly from law enforcement officials.)[
Some of the scholars assert flatly that the death penalty, a
distinguished from imprisonment, is not a deterrent;[36] o
may even have a contrary effect and actually incite com
mission of the very crime it seeks to deter.[37] More cautiou
scholars say only that there is no evidence to support th
theory that the death penalty is a deterrent superior t

34. Sellin, *The Death Penalty*, 19-63 (1959); Sellin, *Capita Punishment*, 135-186 (1967); Calvert, *Capital Punishment in th Twentieth Century*, 51-90 (1928); Mattick, *The Unexamined Death* 8-28 (1966); Koeninger, *Capital Punishment in Texas, 1924-1928* 15 CRIME AND DELINQUENCY 131, 141 (1969); Sellin, *Does the Deat Penalty Protect Municipal Police?* in Bedau, 284; Campion, *Doe the Death Penalty Protect State Police?* in *ibid.* 301; Savitz, *Th Deterrent Effect of Capital Punishment in Philadelphia*, in *ibid.*, p 315; Graves, *The Deterrent Effect of Capital Punishment in Ca fornia, ibid.*, p. 322; Royal Commission on Capital Punishment, *Re port* (1953), sections 65, 67-68; Reckless, *The Use of the Deat Penalty*, 15 CRIME AND DELINQUENCY 52-56 (1969); McCafferty, *Major Trends in the Use of Capital Punishment*, FEDERAL PROBATION, Sept. 1961, pp. 15-21.

35. Hoover, *Statements in Favor of the Death Penalty*, in Bedau, 130; Allen, *Capital Punishment: Your Protection and Mine, id.*, 135. But not all law enforcement officials agree. See, *e.g.*, Statement of Attorney General Ramsey Clark on S. 1760, Dept. of Justice Release, July 2, 1968. Correction officials, moreover, appear very predominantly to be of the opinion that capital punishment has no significant deterrent effect; Thomas, *Attitudes of Wardens Towards the Death Penalty*, in Bedau, 242; Gottlieb, *Capital Punishment*, 15 CRIME AND DELINQUENCY 13 (1969).

36. Professor Sellin, for example, has asserted positively that there is evidence for the view that imprisonment is as good a deterrent as the death penalty. Bedau, 264. So too has Koeninger, *Capital Punishment in Texas*, 15 CRIME AND DELINQUENCY 132, 141 (1969) ("The death penalty for murder in Texas has not been a deterrent.").

37. Sellin, *The Death Penalty* (1959), 65-69; Scott, *A History of Capital Punishment* (1950), p. 246; Massachusetts, *Report on the Death Penalty* (1958), 27-28; Ohio, *Report on Capital Punishment* (1961) 49; Roche, "A Psychiatrist Looks at the Death Penalty," THE PRISON JOURNAL (Oct. 1958), p. 47.

imprisonment.[38] But even accepting the latter view, we submit, in harmony with Mr. Justice Brennan's position in *Trop* v. *Dulles*, that where the consequences of a choice of penalties is so grave, the Constitution requires some evidence to support the choice made and does not sanction the staking of a man's life on a guess.

In *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), the Court upheld the constitutionality of racial segregation in the public schools. In *Brown* v. *Board of Education*, 347 U.S. 483 (1954) it reached a contrary conclusion on the basis of knowledge regarding the harmful effects of segregation not available when *Plessy* was decided, and certainly not when the Fourteenth Amendment was adopted. Today, the Court has the benefit of knowledge on the inefficacy of the death penalty as a deterrent not available when the former decisions of this Court implicitly (though not directly) held the penalty to be constitutional. The Court, we submit, should no more be bound by these decisions today than it was bound by *Plessy* in 1954.

In sum, we submit that in the absence of at least some convincing evidence that the death penalty does actually deter other crimes to an extent greater than life or long-term imprisonment, the death penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment.

3. The death penalty as a badge of slavery

Every relevant study indicates a strong relation between the death penalty and poverty; for the crime that sends the poor man to the death chamber, the well-to-do, if convicted

38. See authorities cited in footnote 34. Bedau sums it up as follows: "What do all these studies, taken together, seem to show? The results are negative; there is no evidence to support the theory that the death penalty is a deterrent superior to imprisonment for the crime of murder" (p. 264).

at all, is most likely to go to prison. Dean Macnamara of the New York Institute of Criminology was perhaps overdramatic in stating that "It may be exceedingly difficult for a rich man to enter the Kingdom of Heaven, but case after case bears witness that it is virtually impossible for him to enter the execution chamber,"[39] but the substantial truth of the statement is supported by all the authorities,[40] and is conceded even by those favoring retention of capital punishment.[41]

The death penalty is not only a function of poverty, it is also a function of race. There is substantial evidence and agreement among the authorities that recial discrimination is a significant factor in the imposition and execution

39. Macnamara, STATEMENT AGAINST CAPITAL PUNISHMENT, in Bedau, 188. See also Ehrmann, THE HUMAN SIDE OF CAPITAL PUNISHMENT, in Bedau, p. 510. "It is difficult to find cases where persons of means or social position have been executed. Defendants indicted for capital offenses who are able to employ expert legal counsel throughout their trials are almost certain to avoid death penalties. In the famous *Finch-Tregoff* case in California, there were three trials, two hung juries, and finally verdicts of guilty but *without* the death penalty. It is estimated that the cost of these trials was over $1 million. But in the trial of some defendants without funds, juries have deliberated for as little as nineteen minutes, or an hour more or less, and then returned verdicts of guilty and death."

40. Duffy and Hirshberg, 88 MEN AND WOMEN (1962), p. 256; DiSalle, *Capital Punishment and Clemency*, 25 OHIO STATE L.J. 71, 72 (1964); Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1 (1964); Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165 (1967); Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 CRIME AND DELINQUENCY 141 (1969); Statement of Attorney General Ramsey Clark on S. 1760, July 2, 1968; Wolfgang, Kelly and Nolde, EXECUTIONS AND COMMUTATIONS IN PENNSYLVANIA, in Bedau, 482-483; Ehrmann, THE HUMAN SIDE OF CAPITAL PUNISHMENT, in Bedau, 510-511; Mulligan, *Death, The Poor Man's Penalty*, THE AMERICAN WEEKLY, May 15, 1960, p. 9.

41. *E.g.*, Allen, CAPITAL PUNISHMENT: YOUR PROTECTION AND MINE, in Bedau, 138.

of the death sentence.[42] Attorney General Ramsey Clark stated quite categorically in testifying before the Senate Subcommittee of the Judiciary on S. 1760 (July 2, 1968) that "racial discrimination occurs in the administration of capital punishment." By no means untypical is the following finding in a study of capital punishment in Texas: "In several instances where a white and a Negro were co-defendants, the white was sentenced to life imprisonment or a term of years, and the Negro was given the death penalty."[43]

The positive relationship between the death penalty and race is strong, but where the crime involved is rape and more particularly, as in two of the present cases, the rape of white women by Negroes, the relationship is almost uncontrovertible. The statistics of the Department of Justice show that in the United States in the period from 1930 to 1967 although Negroes are only 11 percent of the population, the percentage of whites and Negroes among those executed was, respectively, for murder, 49.9 and 48.9; for crimes other than murder and rape, 55.7 and 44.3; *for rape, 10.6 and 89.0.*[44]

In 1954, the Court in *Brown* v. *Board of Education, supra,* declared racial segregation in the public schools to

42. Wolfgang, Kelly and Nolde, EXECUTIONS AND COMMUTATIONS IN PENNSYLVANIA, in Bedau, 473-477; Macnamara, STATEMENTS AGAINST CAPITAL PUNISHMENT, in *ibid* 188; Murton, *Treatment of Condemned Prisoners,* 15 CRIME AND DELINQUENCY 96-97 (1969); Garfinkel, *Research Note on Inter- and Intra-Racial Homicides,* 26 SOCIAL FORCES 369 (1949); Johnson, *The Negro and Crime,* 271 Annals 93 (1941). See also authorities cited in footnote 34, *supra.*

43. Koeninger, *Capital Punishment in Texas, 1924-1968,* 15 CRIME AND DELINQUENCY 141 (1969).

44. N.P.S., p. 7. An independent study made of Texas for the years 1924 to 1965 shows for murder the relative percentages of whites and Negroes were respectively 36 and 55, while for rape, they were 14 and 83. Koeninger, *Capital Punishment in Texas, 1924-1968,* 15 CRIME AND DELINQUENCY 140 (1969).

be unconstitutional. In 1968 and 1969, the petitioners Jackson and Branch were condemned to death for the rape of white women. A comparison of the states whose statutes in 1954 required or authorized racial segregation in the schools and those which in 1969 authorized[45] the death penalty (and with the exception of West Virginia still do) for rape is, we believe, of great significance:

Segregation States[46]	*Death Penalty States*[47]
Alabama	Alabama
Arizona	
Arkansas	Arkansas
Delaware	Delaware
District of Columbia	District of Columbia
Florida	Florida
Georgia	Georgia
Kansas	
Kentucky	Kentucky
Louisiana	Louisiana
Maryland	Maryland
Mississippi	Mississippi
Missouri	Missouri
	Nevada
New Mexico	
North Carolina	North Carolina
Oklahoma	Oklahoma
South Carolina	South Carolina
Tennessee	Tennessee[48]
Texas	Texas
Virginia	Virginia
West Virginia	West Virginia
Wyoming	

45. In no state is the death sentence for rape mandatory; otherwise a white charged with rape would have to be either acquitted or, as rarely happens, be sentenced to death. See Bedau, p. 413.

46. Murray, STATES LAWS ON RACE AND COLOR, Supp. (1955), p. 6.

47. *Supra*, note 24.

48. In 1915, Tennessee abolished capital punishment for all crimes *except rape*. Bedau, p. 413.

With the exception of Nevada (where the death penalty is permissible only if the rape is accompanied by substantial bodily harm to the victim[49] and where in any event the statute is a dead letter, no person having been executed under it at least since 1930)[50] *every state (including the District of Columbia) which authorizes the death penalty for rape required or authorized racial segregation in the public schools until it was declared unconstitutional.* Conversely, of the 22 states which required or authorized racial segregation in the public schools, all but three (Arizona, Kansas and Wyoming) authorized the death penalty for rape.

This almost one for one relationship between racial segregation and death penalty statutes for rape as well as other statistical and empiric evidence, can be explained in no other way than in terms of racial discrimination. This is the practically unanimous conclusion of the competent scholars who have studied the problem.[51] Thus, Koeninger, reporting on a Texas study, asserts: "The Negro convicted of rape is far more likely to get the death penalty than a term sentence, whereas the whites and Latins are far more likely to get a term sentence than the death penalty."[52] Bedau states (at p. 413) that

> * * * as the National Prison Statistics shows of the nineteen jurisdictions that have executed men for rape since 1930, a third of them have executed only

49. *Supra*, note 24.

50. NPS, p. 11.

51. Bedau, p. 60; Ehrmann, THE HUMAN SIDE OF PUNISHMENT, in Bedau, p. 511. See also authorities cited in note 24, *supra*.

52. 15 CRIME AND DELINQUENCY 141 (1969).

Negroes. In these six states, the very existence of rape as a crime with optional death penalty is, in the light of the way it has been used, a strong evidence of an original intent to discriminate against non-whites.

We recognize that the orders granting certiorari in these cases limit the issue to the constitutionality of the death penalty under the Eighth Amendment and do not extend to any claim under the Equal Protection Clause of the Fourteenth. We suggest, however, that if a white man found guilty of rape is rarely sentenced to death, or if sentenced is rarely executed, then the death sentence for a Negro convicted of the same crime may truly be said to be an "unusual" punishment, and hence violative of the Eighth Amendment. We suggest too another approach. In *Robinson* v. *California, supra,* the Court held that to punish a person for a status (drug addiction) which he cannot control violates the Eighth Amendment. The same reasoning makes violative of the Amendment the imposition on a person of a penalty harsher than ordinarily imposed simply because of a status (the color of his skin) which he cannot control.

While the evidence we have presented herein is most obvious and dramatic in cases of imposition of the death penalty for rape, there is, as we have shown, substantial evidence that by effect if not by purpose the death penalty falls most heavily on the poor and nonwhite in all cases. (The petitioners in the two non-rape cases herein are likewise Negroes.)

Unjust punishment is cruel punishment,[53] and unequal punishment is unjust punishment. It should be so declared by this Court.

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53. *Robinson* v. *California, supra.*

4. The death penalty and the national conscience

We have suggested (*supra*, pp. 18-21) that local or regional standards are not the appropriate measure to determine whether the death penalty constitutes cruel and unusual punishment within the purview of the Eighth Amendment, and that fundamental rights secured by a national constitution must be applied nationally. We submit that viewed nationally "the evolving standards of decency that mark the progress of a maturing society"[54] clearly point to the elimination of the death penalty in the United States.

Although general public opinion has fluctuated over the years, the trend is strongly toward abolition. Where an informed public opinion is concerned, opposition to capital punishment is overwhelming (with the exception of professional law enforcement officials, but not correction officials). Bedau (at p. 236) summarizes the public opinion and attitude surveys as follows:

> • • • It seems fairly probable that: (1) psychiatrists, penologists and possibly social scientists and social workers generally, as well as higher government officials, tend to oppose the death penalty in this country at this time; law enforcement officers tend to favor it. The strength of these divergent attitudes is about equally pronounced. The general public shows a steadily growing trend to doubt the death penalty and to favor abolishing it. • • •

Better than any other agency in a society its religious groups reflect its conscience. The six constituents of the Synagogue Council of America, in whose behalf this brief is submitted, can fairly be said to represent American

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54. *Trop* v. *Dulles*, 356 U.S. at 101.

Judaism, and all favor abolition of capital punish
Some of the others in the rapidly growing numb
religious groups on record as opposed to capital pu
ment are: American Baptist Convention; American
gelical Lutheran Church; Augustana Evangelical Lut
Church of North America; California-Nevada Confe
of Methodists; Christian Churches (Disciples of C
International Convention; Church of the Brethren; C
Federation of Greater Chicago; Congregational Confe
of Southern California and the Southwest; Conne
Valley Presbytery; Connecticut Valley Quarterly Me
of Friends (Quakers); Connecticut Universalist Co
tion; Greater Red Bank Area Council of Churches; M
chusetts Baptist Convention; Massachusetts Coun
Churches; New York State Council of Churches; Nor
California and Nevada Council of Churches; Prote
Episcopal Church in the United States of America;
estant Episcopal Church Diocese of Massachusetts; S
ern California Council of Churches; Southern Calif
Arizona Conference of the Methodist Church; United
byterian Church in the United States of America-Ge
Assembly; Universalist Church of America.[55]

Legislative action reflects this trend. In the past
eral years, five states (Iowa, New York, Oregon, West
ginia and Vermont) have abolished the death pena
In addition, the United States Department of Justic
urged Congress to abolish the death penalty in places
its jurisdiction.[57] But the statute books do not tell th

55. Ehrmann, THE HUMAN SIDE OF CAPITAL PUNISH
in Bedau, pp. 515-516. This listing is far from exhaustive.

56. Bedau, p. 12.

57. Statement by Attorney General Ramsey Clark on S
(July 2, 1968).

story. Nevada, as we have noted, has never legislatively abolished the death penalty for rape; yet not a single person has been executed in that state for rape in at least forty years. There is hardly a state in the Union which does not carry on its books laws which have long become archaic and obsolete. In gauging standards, the *de facto* is more significant than the *de jure*.[58]

An examination of what actually has been happening shows clearly that the death penalty has really become an "unusual" punishment. The number of persons executed within the United States in the years 1930, 1940, 1950 and from 1960 to the present as reported by the Federal Bureau of Prisons[59] are shown in the following table:

1930	—	155
1940	—	124
1950	—	82
1960	—	56
1961	—	42
1962	—	47
1963	—	21
1964	—	15
1965	—	7
1966	—	1
1967	—	2
1968	—	0
1969	—	0
1970	—	0

It is true that some of the decrease may be explained by decisions of this Court[60] and the activities of such organi-

58. *Cf. Poe* v. *Ullman*, 367 U.S. 497 (1961). *McGowan* v. *Maryland*, 366 U.S. 430 (1961).

59. NPS, p. 7 (updated).

60. *E.g., Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

zations as the NAACP Legal Defense and Educational Fund and the National Office for the Rights of the Indigent seeking to make available to poor persons some of the legal services available to the well-to-do, so that some who earlier would have gone to the death chamber with little legal opposition are now better able to use the law to preserve their lives. It is also true that, as of the beginning of 1968, there were 435 persons on death rows throughout the nation[61] and that since then many additional death sentences have been handed down, so that in the event the present appeals and others that are on their way to this Court are unsuccessful some of these persons will be executed. Nevertheless, the steady decline in the number of persons executed during the past four decades can be explained only in terms of a widely held belief that the death penalty is basically cruel and morally unacceptable.

5. International standards

A democracy, our Delaration of Independence asserts, imposes upon its people an obligation to accord a decent respect to the opinions of mankind. We suggest that in deciding whether capital punishment is consistent with evolving standards of decency, this Court can and should accord respect to the opinion of mankind. This is by no means unprecedented. In *Trop* v. *Dulles*, Mr. Chief Justice Warren noted that "The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime." 356 U.S. at 102. He referred to a United Nations' survey of the nationality laws of 84 nations of the world which revealed that only two countries, the Philippines and Turkey, imposed denationalization as

61. NPS, p. 13.

a penalty for desertion, and at least partly on the basis of this fact he held denationalization to constitute cruel and unusual punishment. 356 U.S. at 103.

What is true of denationalization is equally true of capital punishment.

We have quoted Bedau's summary of American attitudes to the death penalty generally.[62] World opinion, as indicated in a survey made under the auspices of the Department of Economic and Social Affairs of the United Nations, is almost exactly the same. The UN reports as follows:[63]

> In the first place, it will be noted that, among the leading authorities in penal science, the supporters of abolition appreciably outnumber those who favor the retention of capital punishment. The specialists of the social sciences, criminologists, sociologists, penologists, psychologists, doctors and writers on social science and criminology are, in their great majority, abolitionists. The supporters of capital punishment, apart from a number of political figures and persons holding high public office, are generally jurists with a traditional training and judges.

It should be noted that here too the reference is to capital punishment generally, even for premeditated murder. When capital punishment for non-homicidal rape is involved, world revulsion is even clearer. The United Nations' survey shows that of the sixty-five nations that re-

62. *Supra*, p. 35.

63. UN Report, p. 64. See also, Ancel, *Capital Punishment in the Second Half of the Twentieth Century*, The Review (International Commission of Jurists), June 1969, 33.

sponded to its inquiries, only four (other than the seven states in the United States cited above)[64] still permit imposition of the death penalty for rape.[65] There is, we suggest, significance in the identity of the four which maintain the death penalty for rape. The four are Republic of China, Northern Rhodesia, Nyasaland, and Republic of South Africa. In respect to South Africa Rhodesia whose policy of apartheid and discriminatio notorious, it is fairly certain that racial considerations the prime factor in the imposition of the penalty of d for rape.

We submit that the evolving standards of civilized cency in the nations of the world no less than in the Un States call for a declaration by this Court that the d penalty in all cases and certainly in cases of non-homic rape constitutes constitutionally impermissible cruel unusual punishment.

Conclusion

All the evidence points to the conclusion that cap punishment is on its way out. It is but a matter of t before the laws authorizing it are repealed or become d letters. The reason for this is that it no longer comp with "the evolving standards of decency that mark progress of a maturing society," and this will become creasingly obvious in the coming years.

Why, then, should not the Court abstain and let t resolve the issue? First, because when constitutio

64. *Supra*, p. 32.

65. UN Report, p. 40.

rights, particularly those that are fundamental, are violated, they should be vindicated promptly.

Thus, in 1966, it was quite clear that the poll tax in state elections was on its way out and had but a few years of survival; yet that fact did not deter this Court from declaring it unconstitutional in the very few states which still retained it.[66] Occasionally, as in the case of racial segregation in the schools, the Court has felt that prompt vindication is impracticable and has contented itself with decreeing effectuation of its decision with all deliberate speed.[67] Looking backwards, it is by no means certain that a judgment ordering reasonably prompt compliance with the constitutional mandate would not have worked better.[68]

But whatever the case may be with respect to school segregation, no practical considerations dictate delay in declaring constitutional rights under the Eighth Amendment. The Court's judgment will require no complex restructuring of communal institutions. As in the case of the poll tax, the judgment will be self-executing.

But, more important by far, until such time as the slow wheels of legislative reform catch up with the national conscience, human lives in an amount which cannot be foretold, will have been extinguished. We who submit this brief borrow from our Jewish tradition in noting that our Rabbis tanght us that he who destroys one life, it is as though he destroyed the whole world; while he who sustains

66. *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966).

67. *Brown* v. *Board of Education*, 349 U.S. 294 (1955).

68. *Cf. Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969).

one life, it is as though he sustained the entire wo
This, we believe, applies even to the life of a murder
a rapist.

In *Trop* v. *Dulles*, 356 U.S. at 100, Mr. Chief Ju
Warren stated that "the basic concept underlying
Eighth Amendment is nothing less than the dignity of
While the State has the power to punish, the Amend
stands to assure that this power be exercised within
limits of civilized standards." These standards, we
mit, require the Court to declare at this time that
death penalty affronts the dignity of man, does not con
with civilized standards and cannot be sustained unde
Eighth Amendment.

Respectfully submitted,

Leo Pfeffer
15 East 84th Stre
New York, New York
(212) TR 9-4500
Attorney for *Amici C*

September, 1971

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69. *Talmud, Sanhedrin*, ch. 4, Mishnah 5.

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IN THE

Supreme Court of the United States

October Term 1971
No. 68-5027

EARNEST JAMES AIKENS, JR.,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California

RESPONDENT'S BRIEF

EVELLE J. YOUNGER,
Attorney General of the State of California,

WILLIAM E. JAMES,
Assistant Attorney General of the State of California,

RONALD M. GEORGE,
Deputy Attorney General of the State of California,
500 State Building,
217 West First Street,
Los Angeles, Calif. 90012,
(213) 620-2093,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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IN THE

Supreme Court of the United States

October Term 1971
No. 68-5027

EARNEST JAMES AIKENS, JR.,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California

RESPONDENT'S BRIEF

QUESTION PRESENTED

The petition for writ of certiorari was granted limited to the following question:

> " 'Does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?' "[1]

STATEMENT OF THE CASE

A. History of the Case

In an indictment returned by the Grand Jury of Ventura County, State of California, on April 30, 1965, petitioner was charged with the murder of Mary Wini-

[1] .... U.S. ...., 91 S. Ct. 2280.

fred Eaton on April 26, 1965, a violation of California Penal Code section 187. [R., Cl. Tr. I, p. 1.][2] The same grand jury on August 13, 1965, indicted petitioner for a second violation of the same provision, the murder of Kathleen Nell Dodd on April 4, 1962. [R., Cl. Tr. III, p. 1.]

In each case two attorneys were appointed to represent petitioner. [R., Cl. Tr. I, pp. 4, 6; Cl. Tr. III, p. 3.] On motion of defense counsel the court ordered that $750 might be expended by said counsel for investigation purposes, $350 for employment of a psychiatrist, and $750 for an electroencephalographer. [R., Cl. Tr. I, pp. 6, 20; Cl. Tr. III, p. 19.] Petitioner's motions for discovery of the prosecution's evidence were also granted. [R., Cl. Tr. III, p. 19; Cl. Tr. II, p. 115.]

Petitioner pleaded not guilty to each charge, and the two cases were consolidated for trial. [R., Cl. Tr. I, pp. 21, 54; Cl. Tr. II, p. 8.] Petitioner then exercised his right under California law[3] to disqualify the judge to whom the case was initially assigned for trial. [R., Cl. Tr. III, pp. 43-44.] Thereafter on three occasions petitioner personally, both his counsel, and the prosecuting attorney waived trial by jury. [R., Cl. Tr. I, pp. 72, 77, 96-100, 109-13; Cl. Tr. II, p. 115.]

After presentation of the evidence on the issue of guilt and extensive arguments thereon, the court found

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[2]References are to the record in the state proceedings. Pending is a motion filed by respondent, with petitioner's acquiescence, requesting that the Court consider this case upon the original record and dispense with the printing of an appendix, since the record comprises several thousand pages. The designations *Cl. Tr. I and II* refer to the two volumes of clerk's transcript in case CR 5527 and the designation *Cl. Tr. III* to the single volume of clerk's transcript in case CR 5705.

[3]Cal. Code Civ. Proc. § 170.6.

petitioner guilty of murder[4] as charged in both indictments and found the offenses to be in the first degree.[5] [R., Cl. Tr. II, p. 209.]

During the course of the further proceedings which took place on the issue of penalty,[6] a difference of opinion arose between petitioner and his counsel[7] as to whether petitioner should take the stand in his own behalf, and the trial court appointed a third attorney for the limited purpose of advising petitioner of his rights and the consequences of taking the stand. After consultation with counsel, and a day's deliberation, petitioner chose to abide by the advice of counsel not to testify. [R., Cl. Tr. II, pp. 269-70.]

After presentation of the evidence on the issue of penalty and extensive argument thereon by counsel (and by petitioner personally, by leave of the court), the court fixed the penalty at death on the Eaton murder. [R., Cl. Tr. II, pp. 274, 296.] After argument on petitioner's motions for new trial or for reduction of punishment, including argument by petitioner person-

---

[4]Until its amendment in 1970 to include feticide, California Penal Code section 187 provided: "Murder is the unlawful killing of a human being, with malice aforethought." Malice is defined in California Penal Code section 188.

[5]Premediated and deliberate murder, as well as murder committed in the perpetration of certain felonies (*e.g.*, robbery, burglary, or rape), is murder in the first degree. Cal. Pen. Code § 189.

[6]First degree murder is punishable in California in the alternative by death or life imprisonment, at the discretion of the trier of fact, while second degree murder is punishable by imprisonment from five years to life. Cal. Pen. Code § 190. California provides for bifurcated proceedings on the issues of guilt and penalty in capital cases. Cal. Pen. Code § 190.1.

[7]One of petitioner's two appointed attorneys became ill during the course of the penalty proceedings, which continued in his absence at the request of petitioner's other attorney. [R., Cl. Tr. II, p. 244.]

ally, said motions were denied by the trial court. [R., Cl. Tr. II, p. 299.] On April 7, 1966, petitioner was sentenced to death[8] on the Eaton murder and to life imprisonment on the Dodd murder,[9] the sentences being ordered to run concurrently. [R., Cl. Tr. II, p. 300; Cl. Tr. III, pp. 134-35.]

Petitioner filed notice of appeal from the judgment imposing the punishment of life imprisonment. [R., Cl. Tr. III, p. 137.] Appeal to the California Supreme Court from a judgment imposing the death penalty is automatic under California law.[10] On February 18, 1969, the California Supreme Court, in a unanimous opinion written by Justice Peters, affirmed the judgment in its entirety. *People v. Aikens*, 70 Cal. 2d 369 [450 P. 2d 258] (1969). On March 25, 1969, the trial court fixed June 4, 1969, as the date for petitioner's execution.[11]

Justice Douglas extended the time for filing a petition for writ of certiorari until May 30, 1969, and on May 23, 1969, stayed petitioner's execution. The petition was filed on May 29, 1969, and, with petitioner's motion for leave to proceed in forma pauperis, was granted on June 28, 1971.[12]

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[8]California Penal Code section 3604 provides: "The punishment of death shall be inflicted by the administration of a lethal gas."

[9]California Penal Code section 190.1 provides in part: "The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the commission of the crime." The record (reporter's transcript, references to which are cited herein as *R.*) indicates that petitioner's age was several days under 17 years at the time of the Dodd murder, and 20 years at the time of the Eaton murder. [R. 4474.]

[10]Cal. Pen. Code § 1239(b).

[11]See Cal. Pen. Code § 1193.

[12].... U.S. ...., 91 S. Ct. 2280.

B. Evidence Received at the Proceedings on the Issue of Petitioner's Guilt

1. The Murder of Kathleen Nell Dodd

In April of 1962 Kathleen Nell Dodd, a 25-year-old Caucasian woman, lived in the City of Ventura, California, with her husband, Ventura County Deputy Sheriff Robert Dodd, and their two daughters, aged three and one. [R. 57-58, 61, 88, 2860, 2882.] Mrs. Dodd was five months pregnant at that time. [R. 127.] Mrs. Dodd had expressed concern over the type of neighborhood in which she lived. Shortly before her death, a two- to three-foot length of pipe was thrown through her front window while her husband was away at work, and during the week or two preceding her death she had observed a brown Dodge or Chevrolet parked nightly near her residence between midnight and 5:00 a.m. She always locked her doors and before opening them always ascertained the identity of her visitors even when their arrival was expected. She had even told a neighbor that in the event a criminal were to intrude into her house, she would run outside in order to lead him away from her children. [R. 59, 2001-02, 2006, 2021-22.]

At 6:30 p.m. on April 3, 1962, Deputy Dodd left to attend his evening college classes. [R. 62.] About midnight Mrs. Clair McWilliams, a resident in the area, was awakened by "a very high, shrill, prolonged scream. It had a very unearthly sound to it." She ran to the driveway on the adjoining property and observed a figure running toward the gate of the patio in a rapid zig-zag motion. She also heard the sound of twigs crackling to her left. As Mrs. McWilliams approached with her 17-year-old son, who was armed with a rifle, and her small dog, she realized that the figure was that of

a woman, from whom a steady stream of blood was flowing, emitting the sound of a running faucet. The blood-covered body immediately collapsed, and the woman, later identified as Mrs. Dodd, appeared to be dead. [R. 24-33, 54.]

Upon his return to the Dodd residence at 1:30 a.m. after visiting some friends, Deputy Dodd had noticed that the back door was unlocked; the television was on; the two little girls were asleep, but Mrs. Dodd was absent. Wet stains which he noticed on the floor, the coffee table, and two chairs appeared to be tea stains. Sixty dollars from a drawer, and a knife normally in a kitchen knife rack, were missing. After several telephone calls to various friends to ascertain the whereabouts of his wife, Deputy Dodd contacted the Ventura Police Department. [R. 62-64, 67-68, 72, 80, 83, 85.]

Police inspection of the neighborhood disclosed the following. Marks in the driveway where Mrs. Dodd's body was found were indicative of a struggle. A pack of matches and a package of Salem cigarettes (a brand smoked by both Mrs. Dodd and petitioner) were found in this area. A trail of blood led from them to the location of the body. Across from the driveway in a grassy area were signs of a person's having crawled along the ground. [R. 92, 140, 154-55, 1321-22, 1491.]

On a railroad embankment about 600 feet from the Dodd home, the police found the missing knife belonging to the Dodds, a pair of panties, and Mrs. Dodd's eyeglasses. An indentation in the soil suggested that a person had been sitting or lying with his head at the top of the embankment, and further down another indentation suggested the former presence of a kneeling

person. Other marks indicated that someone had gone up the side of the embankment and slipped backward. [R. 83, 86, 142-43, 148-49, 153.]

The autopsy performed on Mrs. Dodd's remains disclosed several knife wounds in the neck penetrating the carotid artery, the thyroid, and the voice box, causing extensive hemorrhaging. There were also pressure mark abrasions on the neck, bruises on the arms and legs, and knife wounds on one arm and three fingers and in the chest, one of the lungs, the abdomen, the liver, and the back. The autopsy verified the presence of a 5-month-old male fetus and in the vaginal area the presence of sperm and acid phosphatase, a chemical substance produced by the male sexual organs. In the opinion of the pathologist, sexual intercourse had occurred no longer than two to three days prior to death. [R. 180-205, 210, 215-16, 677.] Deputy Dodd last had sexual intercourse with his wife about nine days prior to her death. [R. 125.] Soil deposited in the crease between the deceased's buttocks was similar in type to that found on the railroad embankment. [R. 217, 616-19, 677-78.]

2. The Murder of Mary Winifred Eaton

In April of 1965 Mary Winifred Eaton, a Caucasian woman in her sixties, lived with her husband Frank Eaton in the City of Ventura, California, with their adopted children, Eddie Eaton and Susan Mann, and Susan's husband, David Mann. [R. 1128-A, 1740-41, 1802-03, 2860.] On April 26, 1965, Mr. Eaton left for work at 7:35 a.m. and Susan, David, and Eddie left the house at 8:20 a.m. [R. 848, 1741.] At that time Mrs. Eaton told Susan that she was going to wax the floors, as she apparently began to do later in the morn-

ing. [R. 1742, 1749-50.] A commercial census taker who had previously known Mrs. Eaton received no answer upon knocking at the Eaton residence at 10:00 a.m. but did speak to Mrs. Eaton on a second visit that morning between 11:00 and 11:30. No witness testified to seeing her alive after that hour. [R. 771-75.]

Upon returning home about 3:40 p.m., Susan and David were greeted by petitioner from across the street. [R. 1742-43.] Mr. Eaton returned home about 5:00 p.m. [R. 849-50.] The Eaton family became concerned when Mrs. Eaton did not return, and they began a search of the house. Her automobile was in the garage, and a door between two adjoining garages, usually kept closed, was open. [R. 857-59.] Money was missing from a grocery purse, and a vacuum cleaner was overturned. [R. 852, 856-57, 1746, 1763-65.] At 6:45 p.m. Mrs. Eaton's body, initially overlooked because it was mostly covered with bedding, was discovered by her husband in Eddie's bedroom. [R. 861.]

Mrs. Eaton's hands were bound behind her with a belt, and another belt was tied around her neck. [R. 902-04, 1358-59.] An autopsy revealed that a knife, apparently taken from a drawer in the Eaton residence, had been used to stab her repeatedly; the major cause of death was hemorrhage and shock caused by a large wound in the neck severing the jugular vein and the trachea and reaching the spine. Other knife wounds were located in the back of the neck and the chest, with five entries into the heart. A vaginal smear taken from Mrs. Eaton disclosed the presence of sperm and seminal fluid. [R. 1631-38, 1643-46, 1649, 1662, 1807, 1834, 1839.] Mrs. Eaton had last had sexual relations with her husband seven days prior to her death, and

apparently he was physiologically incapable of producing sperm. [R. 867, 1596.]

Mrs. Eaton's body had been partially covered with bedding, and an attempt had been made by her assailant to remove blood from the knife prior to replacing it in the kitchen drawer. [R. 861, 1288-89, 1839.] Two purses were found near her body. [R. 862-63.]

3. Statements and Conduct of Petitioner Implicating Him in the Dodd and Eaton Murders

On August 25, 1961, petitioner, a Negro, was delivered to the Southern Reception Center of the California Youth Authority at Norwalk; he was transferred to the Preston School of Industry on October 10, 1961, and paroled on March 12, 1962. [R. 1966-67, 2850.]

On March 27, 1962, petitioner's mother, Mrs. Liller Lewis, purchased a brown and tan 1953 Chevrolet from McMonica Motors. Thereafter petitioner stopped by the agency frequently; he was driving the vehicle. [R. 2432-37, 2479-81.]

On April 3, 1962, petitioner asked Mike Dixon to drive him home from the residence of a friend named Carter. When Dixon refused, petitioner pulled a knife on him, but Dixon viewed the incident as a joke, and he and Thomas Chambers drove petitioner home about 11:00 p.m. Petitioner told Dixon that he had a date with a "white woman" that evening. [R. 495-99, 508-09, 512-13.] Three or four days earlier petitioner had spoken to Chambers about a "white woman" and had stated that "she had a good pussy." [R. 238.]

Dixon saw petitioner at police headquarters on the morning after the Dodd murder, at which time petitioner related that he was being held on suspicion of

having killed Mrs. Dodd. [R. 502-03.] On the following day, at Carter's house, petitioner told Dixon, "'I killed the Dodd woman'" because "'[s]he was going to cut me loose.'" Asked about a scratch on his face that had not been there the evening before, petitioner replied, "'Nothin' but that good lovin'.'" When petitioner removed his shirt while washing an automobile, scratches on his back were apparent. Asked about them, he reiterated his previous remark. [R. 503, 505-07.]

However, on the evening after the Dodd murder Chambers had seen petitioner at Carter's house and had asked him about the scratch on petitioner's face. Petitioner replied that Ida Spellman, a policewoman, had slapped him (which in her testimony she denied). [R. 240-41, 607-08.] Two or three days later petitioner told Dixon, as well as petitioner's parole officer, that he had scratched his face on a nail in a garage. [R. 241, 601, 605.] When Dixon and Carter confronted him with his inconsistent explanations concerning the scratch, petitioner said he did not wish to discuss the matter. About this time petitioner was present when the Dodd murder was discussed and said he did not want to hear about it. Petitioner had money at this time, and four or five days after the Dodd murder he apparently lost $75 or $80 gambling. [R. 241-43.]

Three months after the murder, Deputy Dodd saw petitioner at the booking office of the Ventura County Jail. At that time Deputy Dodd was not investigating any crime involving petitioner, nor did he interrogate him. Petitioner initiated a conversation and asked Deputy Dodd if he was the deputy sheriff whose wife had recently been killed. When Deputy Dodd replied affirmatively, petitioner declared, "'It must have been a

pretty bad guy that would do something like that.'" [R. 87-89, 92.]

On July 19, 1962, petitioner was returned to the custody of the Youth Authority at the Preston School of Industry and transferred to the Southern Reception Center on September 28, 1962. He was paroled on December 20, 1962, only to be returned to the Southern Reception Center on February 20, 1963, and transferred to the Youth Training School at Ontario, California, on March 1, 1963. Paroled again on January 16, 1964, petitioner was returned to the Southern Reception Center on March 30, 1964, apparently on a charge of assault and battery, and transferred to the Youth Training School on April 20, 1964. [R. 1375, 1966-67.]

During these periods of custody he made the following incriminating statements to other inmates.

In July of 1962, Barney White met petitioner in the Ventura County Juvenile Hall. The two of them observed Deputy Dodd and shortly thereafter petitioner told White that when he was burglarizing the Dodd house, Mrs. Dodd had tried to get him to leave; he had picked up a knife, chased her outside through a field near the railroad tracks, and raped and killed her, leaving the knife near the tracks. [R. 453-56.]

About the same time, petitioner pointed out Deputy Dodd to another inmate as the deputy whose wife had been killed, and told the inmate, Bennie Rochester, that petitioner had killed her. Subsequently, petitioner said he "was just kidding," and upon encountering Rochester shortly before the present trial, three years later, petitioner told him he was "going to get" him. [R. 468-71.]

At the Preston School of Industry, petitioner approached Gene Noreen, who was reading a comic book. Petitioner was "bragging" about "raping" and "killing" a "'sheriff's wife.'" [R. 427-28, 434, 440.] He related that he had gone up to her house and knocked, that she opened the door a bit, then tried to close it; he forced his way in and tried to rape her, but she scratched him. He related tearing off Mrs. Dodd's clothes, chasing her, and cutting her up. [R. 432, 442-44.] Petitioner had a knife, which he kept sharpened, during his stay at the institution. [R. 433.]

Richard Carreiro knew petitioner at Preston in 1962. Petitioner told him he had gotten into an argument with a "white girl" and had killed her. In 1963 the two inmates saw each other at the Youth Training School, where petitioner repeated his statement, and possibly said he was "going with" her; he said he "[s]lapped her around, she started running. He was chasing her through back ways, caught her in the yard and stabbed her" "a lot." [R. 474-77, 484.]

On February 26, 1965, petitioner was paroled from the Youth Training School. [R. 1966-67.]

During the second week of April, 1965, petitioner showed up at the office of Inspector King, Chief of Detectives of the Ventura Police Department, and told him that he had information on narcotics and wanted to work as a narcotics agent. Inspector King said he would discuss the matter in the event petitioner produced some reliable information. When petitioner appeared at Inspector King's office a week later and claimed to be broke, King gave him $2 of King's own money. [R. 1399-1401.] During this period another officer gave $1 of his own money to petitioner when he

showed up at the station claiming he was short of money. [R. 621-22.]

On April 13, 1965, thirteen days prior to the rape-murder of Mrs. Eaton, the county health department tested petitioner, found him to have gonorrhea, treated him, and told him to return monthly for blood tests. [R. 1939-41.]

Petitioner was an acquaintance of Eddie Eaton and had been inside the Eaton residence on five occasions. Mr. Eaton described him as a "rather sharp boy" who "knows what he sees," and who "could do almost anything if he decided to really do it"; a person "having lots of ability" but not always truthful. [R. 886-90, 1803-06.]

On the Saturday night preceding Mrs. Eaton's death, petitioner and some acquaintances went to Michael Lawthorn's house. When the conversation turned to girls, petitioner remarked that he knew quite a few, that he had been out with Caucasian girls, and "that they were a nice piece of ass." [R. 345-49.] On the following evening petitioner advised Lawthorn on the subject of "how to make girls hot." [R. 352.] Petitioner also attempted to listen through the wall to a "young couple that lived next door, . . . getting ready to go to bed," and proposed a scheme to take photographs of persons through their windows at night and blackmail these individuals. [R. 354-55.]

On April 26, 1965, petitioner was seen in the general neighborhood of the Eaton residence by various witnesses — at 10:30 a.m., before 11:00 a.m., around 11:00 a.m., and at 11:30 a.m. [R. 722-23, 763, 2376-77, 2381-82, 2396-97.] About noon, petitioner asked Mr. and Mrs. Ira Shinavar, who lived approx-

imately across the street from the Eatons, whether there was any work for him to do. Petitioner was offered a dollar to catch a gopher under their lawn. Petitioner replied, " 'Well, I just got to see about getting me some work,' " and walked across the street to the house of Mrs. Catherine Lopez. [R. 801-05.]

Mrs. Lopez, who was not fully dressed, heard a man say "hello," thought it was her son-in-law, and was surprised upon looking up to see petitioner through the screen door. He was giggling and, when asked what he wanted, asked if he could cut her lawn. As he spoke to her, he jiggled the doorknob. Mrs. Lopez declined his offer, and he walked toward the corner house where Mrs. Eaton resided. She placed the time of his departure shortly before 12:27 p.m., because she placed a telephone call in order to check on the time so she would not miss the 1:00 p.m. bus. [R. 649-54.]

Some time prior to 1:00 p.m., petitioner returned to the Shinavars with a cultivator and some wire to use in catching the gopher, a task which he unsuccessfully attempted for a few minutes. Mr. Shinavar said petitioner had been gone 35-40 minutes between the two times that Mr. Shinavar had seen him. Petitioner related that he had "scrounged" the cultivator and the wire "on the corner" (the residence of the Eatons, to whom the implement belonged) and that no one was home. Petitioner then left the Shinavars and walked to his home, where he was met by his parole officer, Mr. Eugene Ansell, at 1:10 p.m. [R. 806-09, 817, 865-66, 885-86, 906-07, 1372.] That afternoon he told Mr. Ansell, " 'It seems like every time things start to go well for me something happens to mess it up.' " [R. 1383.]

Later that day petitioner persuaded a friend, Willie Tenner, to drive him to Pasadena, in Los Angeles County. Petitioner, who had not had enough money for bus fare that morning, purchased some perfume, went to buy a pair of shoes, paid $5 for gas, and purchased a six-pack of beer. [R. 373-74, 760-63, 925-33, 1405.] They then proceeded to Pasadena to the home of a girl known by petitioner and spent the evening with some girls, during which petitioner bought cigarettes and a bottle of vodka for Tenner, cigarettes, soft drinks, bread, and popcorn for the mother of one of the girls, four phonograph records, and more beer. [R. 933-39, 1024-25, 1030-31.]

Petitioner tried to slip a silver ring on the finger of Anita Jones, but she refused it, telling him to give it to his girl friend Corina Franklin (who was only two days from giving birth). When she asked where he obtained it, he said never mind where. Petitioner showed two rings, subsequently identified as Mrs. Eaton's wedding band and engagement ring, to Margaret Knowles and told her he planned to give them to Corina. He told her he had purchased the rings. Petitioner visited Corina on a date which she placed at April 26, 1965. He stayed at her house occasionally and kept some of his clothes there. He showed her Mrs. Eaton's two rings. The wedding band fit her finger, but she was unable to remove it; the engagement ring was too small for her to wear. When Corina asked petitioner where he had obtained the rings, he at first ignored the question and then said he had a job as a fry cook in Ventura. When Corina's mother twice asked that same question, petitioner did not respond but indicated that he was singing at a night club and working as a fry cook. [R. 993-96, 1101-09, 1146, 1153, 1193.]

That same evening petitioner slipped Mrs. Eaton's engagement ring on the finger of Belinda Pickens, telling her that he hoped he had gotten the right size. He declined to tell her where he had obtained it. [R. 1021-23, 1026-29.] Thereafter petitioner, Belinda, and some of their friends drove into the mountains. When they parked, they "heard something," and petitioner took a long knife from under the car seat. [R. 1034-36.] Later that night petitioner and Belinda spent some time on a blanket in a park, where she declined his offer of sexual relations. [R. 1038-39.]

As petitioner and Tenner drove back to Ventura that night, petitioner said to him, " 'When I gets back to Ventura, the police will probably be waiting for me when I gets back. They will probably be settin' on my doorstep when I get to Ventura.' " [R. 947.]

Indeed, they were. As he walked up his driveway at 6:00 a.m. on April 27, 1965, petitioner noted the presence of police officers, who had awaited him there since 2:30 a.m. [R. 1251-53.] Petitioner inquired, " 'You guys looking for me?' ", and accompanied the officers to Inspector King's office, where he appeared very nervous, was unable to stop pacing, and expressed his impatience. [R. 1253-54.]

Two days later, while in custody, petitioner was informed by Inspector King that Mrs. Eaton's rings had been found and remarked, " 'Oh man, I've been had. Them damn rings.' " [R. 1431.] The rings, which Mrs. Eaton had been seen wearing the day before her death, had wax on them, possibly the type she was using on the floor, and a quantity of blood too small to type. [R. 1847-48, 2407-10.] Petitioner told Inspector King the following conflicting stories concerning Mrs.

Eaton's rings, which bore her initials and her husband's he had had them " 'for so goddamn long it's been pitiful' "; he " 'bought them from some cat . . . down on the corner, yesterday,' " and that when he obtained the cultivator from the Eaton residence he saw the rings " 'laying on the ground and I picked them up and stuck them in my pocket.' " [R. 1431-32, 1436, 1444.]

In early May petitioner told an inmate in the jail, David Luker, that he had "killed the woman . . . but he didn't rape her." [R. 1694-95, 1698.]

A cellmate of petitioner's, Bobby Williamson, testified to the following statements made to him by petitioner in late April or early May of 1965. Petitioner said he knew who killed Mrs. Eaton but that it was not he; that he had gone to her house to borrow some tools, saw the rings inside the open door, and took them. The only person he saw on the premises was "a boy leaving there with bloody gloves in his pocket." [R. 1125, 1128-A, 1129.]

With reference to Mrs. Dodd, petitioner told Williamson that he had been approached by two male Negroes, one of whom was "going with" her, and that they had asked him "did he want some pussy." Petitioner responded affirmatively, but when informed that they were referring to Mrs. Dodd, declined the offer because he "didn't want to get in any more trouble." Petitioner told Williamson that someone in a bar had approached him to tell him that Mrs. Dodd had been raped, killed, and "thrown out in an alley." Nonetheless, petitioner recounted that he might as well plead guilty since "the district attorney's office was going to railroad him anyway." [R. 1131-33.]

In June or July of 1965, petitioner showed Williamson his sexual organ and said he would show it to the doctor to demonstrate that, having gonorrhea, he could not have raped Mrs. Eaton. Petitioner also inquired whether Williamson thought "if he tried to act insane, would it do him any good," and Williamson said he "didn't think it would with the charge he had on him." [R. 1133-34.] On August 19, 1965, petitioner told Williamson, "if they didn't get him out of that county jail, he was going to kill someone else." [R. 1133.]

Near the end of October, 1965, petitioner told Lieutenant Urias of the Ventura Police Department that one of his fellow inmates, Sam Waldron, had made statements indicating the inmate's involvement in the Dodd murder. Petitioner also told Urias, " 'Well, look, I'm a marked man. . . . And now a story about some rings. I'm doomed.' " [R. 1715, 1717, 1720-21.]

On November 8, 1965, at the jail, petitioner approached Deputy Sheriff Gary Markley and inquired when petitioner would get back his shoes. When told that they were in evidence, petitioner became excited and said, " 'Those weren't even the shoes I was wearing when I—' "; he then stopped himself, and his face went blank. [R. 1821-23.] On November 24, 1965, Deputy Sheriff Don Kent, who had custody over petitioner during the present trial, heard petitioner make the following statement during the course of the testimony of Mrs. McWilliams, the woman who found Mrs. Dodd's body: " 'She is saying things that only I know.' " While Deputy Dodd was testifying with reference to the amount of money in the drawer at the Dodd residence, petitioner told Deputy Kent: " 'He wouldn't know that unless someone told him.' " During the course of a recess later that day, petitioner asked Deputy Kent

on three occasions to ask Deputy Dodd who it was who had given him all his information. And with reference to Mrs. McWilliams and her son, who had approached Mrs. Dodd's body armed with a gun and in the company of a small dog, petitioner said, "'They were out there to kill me.'" [R. 1825-27.][18]

C. Evidence Received at the Proceedings on the Issue of Penalty

1. The Murder of Clyde J. Hardaway

On the morning of June 7, 1962, Edward Danner, an employee of the Park Department of the City of Pasadena, California, discovered a body, later identified as that of Clyde J. Hardaway, a male Negro in his forties, in a park located near Devil's Gate Dam. [R. 3424, 3481-83, 3865.] Mr. Danner attempted to rouse the man and, realizing that he was dead, summoned the police. [R. 3482, 3485.]

When the police turned the body over on its back, the penis was exposed through the fly of the pants. [R. 3881, 3883, 3929.] There was blood around the face and skull portions of the body. [R. 3879.] Automobile tracks were apparent near the body as well as two moist spots which, the officers concluded, were where two persons had urinated on the ground. [R. 3871, 3930.] An autopsy determined the cause of death to be hemorrhage and brain damage resulting from two gunshot wounds, in the left temple and the rear of the skull, with particles of burned gunpowder embedded in the area of the wounds. The fatal weapon, which ballistics tests showed might have been a derringer, was determined to have been fired in each instance

[18]The trial court's findings of fact on the issue of guilt appear at R. 3372-3419.

from less than four inches from the victim's head. There was also an abrasion on the victim's forehead and a contusion over one of his eyes, apparently caused by the assailant's dragging the body along the ground. [R. 3498-3501, 3512-16, 3528, 3921-23, 4229, 4236.] Laboratory analysis showed 0.15 percent alcohol in the deceased's blood, which would have made him a borderline drunk driver, and indicated the presence of blood and semen on the fly area of the boxer shorts worn by Mr. Hardaway at the time of his death. [R. 3519, 4177.]

Petitioner was identified as Hardaway's assailant through circumstantial evidence and his own statements.

On the night of his death the deceased, a homosexual, had been drinking heavily and had on his person $100-$200. He was planning to send money to his daughter in Texas, although it was also his habit to carry large sums of money on his person. [R. 3575-78.] That night a friend of his saw Hardaway talking to a young male Negro in Hardaway's automobile, and apparently saw Hardaway hand the person some money. [R. 3565-67.]

On the morning of June 8, 1962, the deceased's vehicle was found abandoned in Oxnard (a city adjacent to Ventura). Blood spots were observed on the outside of the vehicle. [R. 3854, 3857-59.]

On June 7, 1962, petitioner had purchased a used automobile in the City of Ventura, making a $107 cash down payment on the $132 vehicle. [R. 416.] That same day he was back in Pasadena giving Corina Franklin a ride in his new acquisition. When she asked him where he had obtained it, he replied, " 'None of

your business.'" [R. 3659-61.] That same day petitioner pulled out a gun and said he was going to shoot a dog that had been playfully chasing them. Corina's inquiry as to where petitioner had obtained the weapon met with the same response. [R. 3661-62, 3673-74.] The vehicle was later found abandoned on a Los Angeles street. [R. 4091-92.]

A gun having the same appearance as the one viewed by Corina, a derringer with white handles, had been stolen from Mr. Roy Young in Ventura on June 6, 1962, the day before Hardaway's body was found. The gun, which Mr. Young kept under the head of his bed, was taken when someone broke the window over his bed and entered while Mr. Young was at work. The theft took place one or two days after Mr. Young had shown the weapon to petitioner and let him fire it. [R. 3661, 3968-72, 3975, 4156-57.] Petitioner had told a friend, "'I got a little derringer.'" [R. 3896.] Petitioner's presence in Ventura on the day of the theft was established. [R. 4166-68.]

On June 11, 1962, a male Negro approximating petitioner's physical description, although described as about 22 years of age, pawned Mr. Hardaway's camera in Pasadena, signing petitioner's name, but never reclaimed the camera after a notification of the expiration of the pawn period was sent to 1950 Mentone Street, Pasadena, the former address of petitioner's half sister. [R. 3944-51, 4016-18, 4173, 4590, 4823.]

In June and July of 1962, petitioner volunteered to John Pena and Arthur Pena, in the juvenile tank of the Ventura County Jail, that petitioner had been picked up hitchhiking in Los Angeles by a "queer," went into the mountains with him, pulled out his derringer, made

him get down on his knees, and when "the guy bent down to blow him" shot him in the head a couple of times, killing him, taking his wallet, and using the money to buy an automobile. [R. 4024, 4026-27, 4029-31.]

Sometime in 1963 or 1964, at the correctional Youth Training School, petitioner volunteered to another inmate, Richard Carreiro, that he had shot a homosexual " 'blood' " (fellow Negro) in the head and killed him, that it was like "playing the part of the Deacon" (a hired gunman, portrayed on television, who made his victims kneel and then shot them in the forehead). [R. 3547-49, 3557.] At this institution petitioner showed a photograph of Mr. Hardaway's daughter, inscribed to Hardaway and taken from his wallet, to other inmates in the course of their showing each other their girl friends' pictures. [R. 3889-90, 3893.]

2. Other Felonious Conduct by Petitioner: Burglaries, Attempted Rape, and Assault With Intent to Commit Rape

On July 6, 1961, petitioner burglarized Scritchfield Motors in the City of Ventura. Petitioner broke several windows, entered the premises, and attempted to steal an automobile. Petitioner managed to elude a pursuing police officer who fired a shot at him. [R. 4201-04, 4243-44.]

Sometime during the summer of 1962 between 9:00 and 10:00 one evening, petitioner removed the screen and opened a window in Louise Gunn's house in the City of Ventura. Mrs. Gunn took her gun, "eased out" the back door, and observed petitioner, leveling the gun at him. He ran away and then proceeded to walk to his house, whistling. On the following day Mrs. Gunn spoke to petitioner and his mother about the in-

cident, and he "said something smart" to her. Mrs. Gunn told them that the only reason she did not shoot him was that she had known petitioner's mother for years, and that if he did it again petitioner would be killed. [R. 4094-98.] Within two weeks the gun was stolen from her house. [R. 4118.]

On Christmas Day of 1962, Dorothy Ann Piggee, then 15 years of age, met petitioner in the City of Pasadena. After spending some time with him and some friends, she accepted his offer to "walk me home and see that I got home safely." On the way, petitioner suddenly pulled her down. When she began to scream, he put his hand over her mouth and told her to "shut up or he would kill me." Petitioner then terrified her by placing a letter opener at her neck and tore off her underpants. In the victim's words, "he tried to have an intercourse with me, but he couldn't. . . . [H]e put his finger up there, and he broke my maidenhead," and bloody fluid was emitted from her sexual organ. Petitioner was unsuccessful in achieving entry with his sexual organ. He told her, " 'How would you feel, not having a girl for a year.' " She then ran home, with petitioner in pursuit, and complained to her mother, who decided to take her to the emergency hospital. Petitioner then came up to her mother and "told her that he had did it." [R. 4250-54, 4261, 4264, 4281-83.] The victim was medically treated for a tear in her hymenal ring. [R. 4123-24, 4129.]

Emory McMurray, Jr. had petitioner assist him in his commercial rubbish collection business. He directed petitioner to pick up some refuse from Mrs. Beverly Metcalf, but never from Mrs. Deborah Bunnell. [R. 4316-21.] On February 4, 1964, petitioner drove a truck to Mrs. Metcalf's residence and picked up the

trash. He asked Mrs. Metcalf how her husband was and whether they had a dog. Then he asked to use the bathroom. After hesitating, she gave him permission, and while he did so he left the bathroom door open. After returning to the trash receptacles outside, petitioner tried to re-enter through the back door, but it was locked. Mrs. Metcalf then denied his request to enter to use the telephone. [R. 4330, 4333-36, 4338-40.]

Less than an hour later, petitioner appeared at Mrs. Bunnell's house and asked to use the telephone, which she let him do. He chatted with her a few minutes, and then she suggested it might be time for him to return to work. Instead of going out the front door as she expected him to do, he sat down on a chair in the living room. She then repeated her suggestion, whereupon he got up, spun her around, grabbed her across the chest, and placed a hand over her mouth, dragging her some distance. She screamed and fought him, liberating herself and reaching the front door, and he finally obeyed her command to leave. Petitioner's shirt was filthy, and she found her face and shirt covered with black dirt. [R. 4330, 4362-71, 4378.] Her mouth was full of soot and dirt from petitioner's gloves. [R. 4380.] Mrs. Bunnel reported the incident to the police as an assault with intent to commit rape. [R. 4296-97.]

3. Psychiatric and Psychological Evidence

Three psychiatrists and one psychologist testified at the penalty proceedings, all having been called by the prosecution.

On March 20, 1957, Dr. Walter Streitel, a psychiatrist, examined petitioner at Juvenile Hall in Ventura. At that time, when petitioner was 11 years of

age, he had a history of "difficulties with the law." Dr. Streitel "found absolutely no indication of any psychotic manifestations"; petitioner "fitted most adequately in the category of a sociopathic personality disturbance." [R. 4049-52.] Dr. Streitel noted, "we haven't seen much benefit from all of the efforts made to rehabilitate this kind of a person." [R. 4053-54.] Petitioner's commission of the Eaton and Hardaway murders was "entirely consistent" with the foregoing diagnosis, and in conjunction with the commission of the Dodd murder led Dr. Streitel to conclude: "It is rather unlikely that rehabilitation could be expected." [R. 4056-63.]

On September 15, 1961, Dr. Stephen Howard made a psychological evaluation of petitioner at the Southern Reception Center and Clinic of the California Youth Authority. Dr. Howard concluded that petitioner was a person "of adult normal intelligence" with "strong underlying anger and aggression" and therefore "potentially dangerous." Dr. Howard "diagnosed him basically as an inadequate personality," finding that his character disorder was "entrenched" and that " 'the prognosis is poor' " for change in the future. [R. 4071-75.]

In 1963, at the Southern Reception Center and Clinic, Dr. Joseph Veich, a psychiatrist, examined petitioner and developed a history of his mental background. Dr. Veich concluded that petitioner was not a "sexual pervert or sadist" and that petitioner had no mental or emotional disorders. Dr. Veich did not find him to be a sociopath. Petitioner was mentally normal and did not give much indication of remorse. [R. 3474-78.]

In April of 1964, Dr. Veich again saw petitioner at the same institution and found his mental condition

unchanged—mentally normal and essentially healthy. [R. 3478-79.]

On April 27, 1965, Dr. Donald Patterson, a psychiatrist, examined petitioner at the Ventura Police Station. Petitioner showed no evidence of a psychotic reaction and was fully in contact with reality. Dr. Patterson's conclusion was "that he did not present a mental illness or psychosis, but that rather he presented evidence of a long-standing personality maladjustment . . . which in my opinion qualified me to diagnose him as presenting a sociopathic personality disturbance." [R. 4185-87, 4191-93.] Asked what the prospects for rehabilitation were for a man with petitioner's sociopathic personality difficulties, Dr. Patterson concluded, on the basis of petitioner's "long history of difficulties of an overt nature," "problems in the home situation," "his general attitude, which is one of tendency to deny responsibility, . . . the marked trend toward untruthfulness," and petitioner's tendency to blame the community for not understanding him and for treating him unfairly, that the "prospects . . . for helping this individual are extremely limited." [R. 4194-96.]

4. Defense Evidence Related to Petitioner's Background[14]

Petitioner's mother testified in his behalf. She was 59 years of age at the time of trial, was born in Louisiana, had little schooling, and claimed to be illiterate. She described her first marriage, at the age of 13, and a second marriage to a pastor, her move to California in 1930, her separation from her husband, and her move to Ventura in 1936. She had supported

[14]The defense evidence which purported to controvert petitioner's guilt of the charged offenses and certain of the collateral offenses was inconsequential and is therefore not summarized by respondent.

herself and her two daughters since then by doing day housework. [R. 4469-73.] After cohabiting with another man, she met a serviceman who fathered petitioner. However, Mrs. Lewis never married again, and shortly after petitioner's birth on April 18, 1945, she ceased seeing petitioner's father, who failed to continue supporting her or petitioner. A year after the birth of petitioner, his father ceased writing to Mrs. Lewis. Petitioner never saw his father thereafter. [R. 4474-77, 4480.]

She ceased doing housework at $1 an hour when welfare officials told her to stay home to care for petitioner and gave her $80 a month for support. [R. 4478-79.] Because she was illiterate she could not help petitioner with his school homework. [R. 4480.] She moved to $30-a-month federal housing, by which time her welfare had increased to $110, and she worked to bring in additional money. [R. 4481-82.]

Petitioner had trouble with the law and for about a year was placed in the custody of Thelma Calloway, a half sister who lived in Pasadena. [R. 4482-84.] Her testimony described this period in his life. [R. 4579-82.] Petitioner returned to Ventura to live with his mother. [R. 4485-87.] Thereafter petitioner did "o.k." in school and had no trouble there. He was under the supervision of a probation officer at the time. [R. 4488-89.] Petitioner also spent about a year in San Diego with his other half sister at this juncture in his life, thereafter again returning to his mother in Ventura. [R. 4489-90.] Petitioner went to school, was arrested, and was then committed to the Los Priestos School. Upon his release he continued his schooling in Ventura until he was again picked up and committed to Preston School. [R. 4490-93.] Shortly after his re-

lease in 1962, petitioner and his mother visited in Pasadena, where he was again committed, because of "something about a girl." [R. 4494-96.] Upon his release and return to his mother's house, he got a job for a couple of weeks wiping cars on a used-car lot. He also had occasional other work, including two or three weeks' work with the McMurray Trash Service. Thereafter petitioner was again committed to the California Youth Authority. Upon his release he returned to his mother's house and began to seek a job. At that point in time petitioner was arrested on the charge of murdering Mrs. Eaton. [R. 4498-4500.] At no time in petitioner's life "did any man act as a father for him." [R. 4501.]

On cross-examination Mrs. Lewis denied the truth of Mrs. Gunn's accusation that petitioner had broken into her house. Petitioner's mother denied knowing whether petitioner's step-sisters had sent him home to Ventura because he got into difficulties and they could not handle him. [R. 4502-03.] Mrs. Lewis also did not know whether petitioner had been in "serious trouble" prior to his eighth birthday. She had no recollection of a complaint from a Mrs. Kelso that petitioner had molested her little girl. [R. 4502-04.] Petitioner allegedly was committed to the Youth Authority on frequent occasions when he was innocent of any wrongdoing. [R. 4511.] Mrs. Lewis did remember that petitioner had once escaped from Juvenile Hall. [R. 4512.][15]

Petitioner's half-sister from Pasadena, Mrs. Callaway, was a clerical supervisor, had a college education,

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[15]Mrs. Lewis had also taken the stand at the proceedings on the issue of guilt, where she likewise testified to her hard-working schedule and cash subsidies to petitioner. [R. 2241, 2269, 2318-20, 2224.]

and was working toward a degree in sociology. [R. 4604.]

The defense also called four officers of the California Youth Authority, who testified that during his various periods of commitment petitioner appeared well-adjusted, obedient, agreeable, and generally cooperative. Petitioner was an especially good athlete and considered the "possibility of a future in collegiate athletics" since one or two colleges had made him an offer. [R. 4605-08, 4611-12, 4643-45, 4649-52, 4659-64.] However, during his confinement he was involved in instigating a fight, which caused a month's postponement of his parole. [R. 4654.] And one of the Youth Authority officers conceded, with respect to petitioner's various commitments, "I honestly don't feel that there was a great deal of rehabilitation done with [him]." [R. 4675.]

5. Findings of the Trial Court in Fixing the Punishment at Death

The Honorable Jerome H. Berenson, Judge of the Ventura Superior Court, made the following findings as trier of fact in fixing the punishment at the conclusion of the proceedings on the issue of penalty:

> "[F]undamental, as I see it, is the grave responsibility of the Court to weigh and to ponder the ultimate question, not only by a review of all of the past criminal record and conduct of this defendant, but also from as incisive an inquiry as possible into his background, his personal history, and his personality. In addition, in my opinion, it is essential that the Court should probe the possibility or probability or likelihood that, when and if such opportunity should at some time in the

future exist, the defendant would or might repeat and recommit crimes of extreme violence. And I must necessarily be concerned with whether or not there is a reasonable prospect of the rehabilitation of this individual.

"Earnest Aikens has since the age of eleven years of age, or thereabouts, been involved in an almost continuous pattern of anti-social and criminal behavior of one sort or another. He has graduated from petty and minor nuisances and offenses through more serious proceedings that have involved Juvenile Court wardship and a commitment to Los Priestos Boys' School and to more recent commitments at the Preston School of Industry and the Youth Training School, both administered by the California Youth Authority. In the instances of his parole from the Authority level, his periods of surcease from criminal behavior have been of short duration. Now he stands convicted of two brutal, cold-blooded and vicious killings, together with the finding that I have here earlier made of his responsibility for a third homicide. Interspersed with the foregoing have been instances of assault, rape and robbery. Such record, at the very least, demonstrates an indifferent, arrogant and obvious disregard for the dignity and value of human life and the rights of others.

"The question must then be asked as to what kind of person, now at the very threshold of his majority, would or could so conduct himself. Dr. Streitel, who examined the defendant when he was eleven years of age, reached the conclusion at that time that he then fitted into the category of a sociopathic personality disturbance. In response to Mr. Deem's hypothetical questions con-

cerning and pertaining to the facts of the Hardaway and the Eaton incidents, the doctor stated that the conduct there indicated was consistent with the diagnosis that he had made of the defendant several years before. According to this qualified psychiatrist a sociopath, despite the possibility of being a pleasant and charming person, has neither regard for the truth or for responsibility. He is self-centered, with little, if any, concern or respect for laws or rights of others, and because of his inability to learn from experience, he constitutes a potential threat of violent criminal conduct. Dr. Streitel expressed the opinion that we have not seen much benefit in the past from all of the efforts made to rehabilitate this kind of person." [R. 4986-88.]

Judge Berenson then reviewed the opinions of Dr. Howard and Dr. Patterson and continued,

"It has been suggested to this Court by counsel for the defendant in a most eloquent and moving plea in his behalf that Earnest Aikens should not be held here accountable alone for the terrible circumstances in which he now finds himself. Mr. Ashby would urge that he is but the product of an American tragedy, for which he is not fundamentally responsible. This encompasses a cold, unrelenting, a bleak and loveless environment, together with the frustrations of poverty and of rejection and, perhaps, of color—all of this part of a certain social and economic disorder of the day. Because of his growing up in this kind of frustrated existence, the defendant, as Mr. Ashby views the situation, should thus be understood as to the reasons for his emergence as a person who is

scornful, who is outraged and who feels alone in society. That this young man may well have been deprived of some of the environmental or other advantages that others have enjoyed cannot, of course, under any circumstances be denied, but I have gained the conviction in my efforts here to seek out the truth that he has been abundantly provided the opportunity to obtain an education without expense to himself or his family; that he has not gone hungry or ill-clothed; that he has been provided the chance to learn responsibility, self-respect, personal dignity and the benefits that may come to one who lives within the rules of society on the occasions when he lived and had the opportunity to be with his sisters in their homes, each of which persons to this Court, and from my observation of them they have impressed me with their demonstrated intelligence, a stability, a social adjustment, and an exemplary personal conduct; and beyond any question of doubt this defendant has had the constancy of a love and a loyalty given to him by a mother, too doting and protective, perhaps, at times, but who without education or material advantage to herself has sought by virtue of her own long and hard toil and labor to provide the defendant with a home, some respectability in the community, and some measure of economic assistance. Mrs. Liller Lewis is not, in my judgment, a person here to be condemned nor to be censured, but she is to be pitied.

"And I cannot avoid the observation that there are many, many persons with early backgrounds much worse, indeed, than that of this young man who have developed and lived as useful and

law-abiding citizens within their respective communities, and who by their own hard diligence, persistence and personal efforts have risen above a questionable environment to which they may have been exposed during their formative years. I cannot accept the premise that this defendant should be excused his conduct or that such should be deemed substantially mitigated in its seriousness because he has not had a father, or because his family has not been more wealthy, or for any of the other reasons that have here been expressed by his counsel.

"In my opinion, he has failed for lack of any apparent desire to help himself or to emulate those around him who have been honest, decent people. Nor does it appear to me, despite the opportunities that have been given to him for an effective rehabilitation, that he has made any real or conscientious effort to become so rehabilitated.

"Finally, I have without avail searched and sought for some indication in this defendant of remorse, of regret, of self-reproach for his acts, of any expressed repentance, or of contrition. It is worthy of note that although . . . [the Youth Authority officers] could speak of the social adjustment made and the athletic prowess demonstrated by the defendant while institutionalized, the record is completely barren from their testimony concerning any show of words or deeds of this young man evidencing any of the foregoing.

"No more awesome or lonely duty, I am sure, can be cast upon any individual than that which this Court is now required to discharge. In the final analysis I must reach a decision consistent

with the dictates of my mind and conscience and heart in accordance with the laws of this state and my responsibility as a judge. The Court seeks to be merciful, but also it must be just. That I feel a compassion and pity for a fellow human being so young in years is manifest. That I must also be sorely concerned with the multiple and aggravated crimes of this defendant against the victims here involved and, indeed, against society in general, is self evident. Against the background of these several considerations I cannot, nor do, reach any other conclusion or finding than that the penalty to be imposed should and must be death." [R. 4989-92.]

SUMMARY OF ARGUMENT.

The Fifth Amendment, ratified simultaneously with the Eighth Amendment in 1791, recognized in its express reference to "capital" offenses what had been implied in provisions of the Constitution as originally drafted, that death was among the forms of punishment available to the federal government. The fact that, in the period immediately preceding and following adoption of the Eighth Amendment, state and federal constitutional prohibitions against cruel and unusual punishment coexisted with state and federal enactments punishing a wide variety of offenses with death, is indicative of the intent of the Framers to bar only those punishments which are both cruel and unusual either in their inherent form or as grossly excessive in their application in relation to the seriousness of a particular criminal act. A long line of decisions by this Court confirms this view of the Eighth Amendment.

This Court's use of the words "evolving standards of decency that mark the progress of a maturing so-

ciety," concurrently with an express recognition of the continued constitutional validity of the death penalty,[16] did not sound a talismanic death knell of three hundred years of capital punishment in this country. The deep-rooted history of capital punishment in this country and in our cultural and religious heritage, and the widespread support for the death penalty among the majority of our population and in most segments of our society, disprove the assertion that the death penalty is a barbaric relic of the past. The failure of the almost annual efforts in the California Legislature to abolish the death penalty, and the concurrent expansion of the list of federal and state capital offenses, are indicative of the continuing recognition of the need for the death penalty as a protection for society.

Petitioner's preoccupation with the judicially-arrested rate of executions, as an alleged indicator of popular disfavor with the death penalty, ignores the reality that a much more accurate barometer of the "evolving standards of decency" is the constant number of defendants whom juries annually send to the nation's prison systems under sentence of death.

Most of petitioner's arguments could more properly be directed to a legislative body, and respondent is hard pressed to comprehend how a constitutional issue is raised by petitioner's claim that alternative remedies to capital punishment are available to the state and federal governments. Respondent does not view its task as encompassing conclusive proof of the social utility of capital punishment. The burden, if any, which respondent must assume is only to demonstrate that there

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[16] *Trop v. Dulles*, 356 U.S. 86, 99, 101 (plurality opinion of Warren, C.J.).

is in fact a basis upon which the California Legislature could reasonably conclude that certain serious offenses should be punishable by death.

There exist obvious flaws in the methodology of the theoretical studies upon which petitioner relies. On the other hand there are numerous graphic illustrations of the deterrent effect of the death penalty collected by respondent, as well as proof of the inadequacy of incapacitation by life imprisonment as protection of society. Thus petitioner has failed to make his case that no legitimate social aim can be furthered by imposition of the death penalty.

Hard figures from the files of the California State Prison at San Quentin and other sources put the lie to the frequently voiced myth that the death penalty is arbitrarily and discriminatorily imposed upon racial minorities, the poor, the uneducated, the mentally deficient, and the "friendless."

Finally, it is clear on the facts of the present case that death is not a cruel and unusual punishment for petitioner, the unrepentant perpetrator of three known separate murders committed for pecuniary gain and sexual gratification, as well as numerous other instances of violent felonious conduct. The psychiatric and psychological evidence is unanimous in establishing that petitioner had no mental disorder and in demonstrating that the likelihood of petitioner's being rehabilitated is very slight. The validity of this conclusion is further supported by petitioner's repeated incarcerations and failures at rehabilitation, and his statement, while awaiting trial on the present charges, to a fellow inmate, that he would kill someone else if he was not released from custody.

Respondent submits that nothing has happened in the 180-year history of the Constitution, or in the 300-year history of capital punishment in this nation, which can alter the fact of the Framers' contemplation of the death penalty as a form of punishment of necessity available to the States for the protection of society in a case such as the one at bar.

ARGUMENT

Petitioner's Sentence of Death and Pending Execution, Resulting From His Conviction of First Degree Murder, Do Not Comprise Cruel and Unusual Punishment

A. Execution Is a Form of Punishment Expressly Recognized by Provisions of the Constitution and Upheld as Constitutional in a Long Line of Decisions by This Court

The sole question before this Court, as set forth in its grant of certiorari, is: " 'Does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?"[17]

Justice Black defined the nature of the task presently facing the Court when he noted last Term with reference to procedural attacks on the death penalty:

> "The Constitution grants this Court no power to reverse convictions because of our personal beliefs . . . Our responsibility is rather to determine whether petitioners have been denied rights expressly or impliedly guaranteed by the Federal Constitution as written. . . ."
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> *McGautha v. California,* 402 U.S. 183, 225-26 (Black, J., concurring). *See also id.,* 195-96, 221-22.

The Constitution as originally[18] written contained only indirect allusions to capital punishment.[19]

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[17].... U.S. ...., 91 S. Ct. 2280.

[18]The Constitution was adopted by the Constitutional Convention in 1787 and ratified by the States in 1788. Legislative Reference Service, Library of Congress, Constitution of the United States of America 28-31 (Rev. Ann. ed. 1964).

[19]Two of the constitutional provisions suggest that the Framers of the original Constitution contemplated capital punishment as an available form of punishment. Article II, Section 2, gives the

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Among the Constitution's objectives, as set forth in the preamble, were to "establish justice, insure domestic tranquility, provide the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." The specification of these objectives suggests that the Framers intended the new federal government to have the inherent power of all governments to decree whatever customary punishments for criminal conduct were deemed necessary "to protect the lives, liberties and property of its citizens," *In re Kemmler*, 136 U.S. 436, 449, absent particular prohibitions written into the Constitution.[20] Similarly three years later the Tenth Amendment recognized that powers not prohibited to the States (or delegated to the federal government) were reserved to the respective States or to the people.

The first ten Amendments to the Constitution were proposed by the First Congress and in turn ratified by the States in 1791. Among these the Fifth Amendment recognized expressly what had been implied in the aforementioned provisions of the original Constitution, that death was among the forms of punishment, for criminal conduct, available to the federal government. That Amendment contains the mandate that "No person

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President the "power to grant reprieves," the latter term being defined in Black's Law Dictionary 1466 (4th ed. 1951) as primarily "[t]he withdrawing of a sentence of death for an interval of time, whereby the execution is suspended," and secondarily as "the withdrawing of any sentence for a period of time." Article III, section 3, provides in part that "The Congress shall have power to declare the punishment of treason." The common punishment for treason in 1787, and a common one now in American jurisdictions retaining capital punishment, is death. Bedau, The Death Penalty in America 6, 43 (rev. ed. 1967).

[20]Compare the absolute prohibition against bills of attainder and ex post facto laws and the prohibition against suspension of the right to habeas corpus except in limited circumstances. Art. I, § 9.

shall be held to answer for a *capital*, or otherwise infamous crime, unless on a presentment or indictment of a grand jury" and further commands that no person "be twice put in jeopardy of *life*" without due process of law. (Emphasis supplied.) The same language from the due process provision was reenacted and made applicable to the States in 1868 by the Fourteenth Amendment.

It is in this context that one must evaluate the nebulous[21] provision of the Eighth Amendment that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

One scholarly inquiry into the history of the Eighth Amendment casts doubt upon the precision with which the Amendment's framers selected the prohibition against "cruel and unusual punishments." Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 Calif. L. Rev. 839, 840-41 (n. 8) (1969).[22] The commentator, quoting from the

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[21]Chief Justice Warren's opinion in *Trop v. Dulles*, 356 U.S. 86, 100(n.32), stated: "Whether the word 'unusual' has any qualitative meaning different from 'cruel' is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn." Commentators have remarked of the Amendment that "many important points concerning its meaning, scope and application are still in doubt." Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U. L. Rev. 846 (1961).

[22]"The history of the writing of the first American bills of rights and constitutions simply does not bear out the presupposition that the process was a diligent or systematic one. Those documents, which we uncritically exalt, were imitative, deficient, and irrationally selective. In the glorious act of framing a social compact expressive of the supreme law, Americans tended simply to draw up a random catalogue of rights that seemed to satisfy their urge for a statement of first principles—or for some of them. That task was executed in a disordered fashion that verged on ineptness. The inclusion or exclusion of any particular right neither proved nor disproved its existence in a state's colonial history." *Ibid.*

meager debate that attended the insertion of this phrase into Virginia's constitution of 1776 (which was followed by the phrase's appearance in the constitutions of several other States and the federal Northwest Ordinance of 1787), the debates of the various state conventions called to ratify the federal Constitution, and the brief discussion of the proposed Eighth Amendment in the First Congress,[23] concludes that "the cruel and unusual punishments clause was directed at prohibiting certain *methods* of punishment." (Emphasis supplied.) *Id.*, 840-42.

The wording of the clause was a verbatim copy of a prohibition in the English Bill of Rights of 1689. *Id.*, 840. The commentator makes a convincing showing that the English antecedent of the Eighth Amendment was "first, an objection to the imposition of punishments which were unauthorized by statutes and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties," and that the framers of the state constitutions and the American Bill of Rights inadvertently misinterpreted the language of the English clause as a prohibition against the torturous punishments of seventeenth century England.[24] *Id.*, 860.

Whether those responsible for the enactment of the Eighth Amendment were directing their concern against

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[23]This discussion, and portions of the debates of the state conventions, are set forth in *Weems v. United States*, 217 U.S. 349, 368-69, 372.

[24]At that time the traditional English penalty for women felons was to be burned alive, which penalty might be commuted to beheading. *Id.*, 853. The penalty for treason "consisted of drawing the condemned man on a cart to the gallows, where he was hanged by the neck, cut down while still alive, disembowelled and his bowels burnt before him, and then beheaded and quartered." *Id.*, 854.

torturous methods of punishment or instead against unauthorized or disproportionate punishment, the penal history of England (illustrated in the preceding footnote) as well as contemporary colonial penal experience indicate that the Eighth Amendment was not intended to prohibit the government at that time or any future time from providing death as a penalty for serious offenses.

As Justice Black noted in his concurring opinion in *McGautha v. California*, 402 U.S. 183, the Eighth Amendment's "words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable . . . that the framers intended to end capital punishment by the Amendment." *Id.*, 226.

The experience of Massachusetts is a graphic illustration of the fact that those who adopted the constitutional prohibition against cruel and unusual punishment had absolutely no intent thereby to abolish the death penalty for all offenses. The Constitution of the Commonwealth of Massachusetts, approved by the people in 1780, declared that "no magistrate or court of law, shall . . . inflict cruel or unusual punishments." Within four years the Commonwealth saw fit "to place upon the statute books of the new government seven laws that called for the penalty of death that seemed to the General Court, at the end of the eighteenth century and at the beginning of the nineteenth century, to constitute the most serious threats to the peace and welfare of the state." Powers, Crime and Punishment in Early Massachusetts 308-09, 608-09 (1966). These seven capital offenses, which represented a reduction

from fourteen capital offenses in effect in the immediately preceding period,[25] comprised wilful murder, treason, sodomy, rape, arson, robbery, and burglary. *Id.*, 309.

The following chronology as well clearly refutes the theory that those who enacted the Eighth Amendment intended thereby to abolish capital punishment. The Amendment passed the First Congress on September 25, 1789. That same Congress, a mere seven months later, enacted *An Act for the Punishment of Certain Crimes Against the United States*, which statute made the following offenses punishable by death by hanging: treason, murder within federal territory, piracy, and counterfeiting of public securities. Act of April 30, 1790, ch. 9, §§ 1, 3, 8, 14, 33, 1 Stat. 112. The Eighth Amendment was ratified by the States on December 15, 1791, and less than four months later, on April 2, 1792, the Second Congress made it a capital offense to debase coins of the United States Mint. Act of April 2, 1792, ch. 16, § 19, 1 Stat. 246.[26]

The subsequent history of the Eighth Amendment, as it has been interpreted by this Court in the 180 years of the provision's existence, likewise lends no support

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[25]During the period 1630 to 1692 the Bay Colony had twenty-five capital laws, although persons were executed only for violation of nine of them: murder, treason, beastiality, adultery, rape, arson, witchcraft, defiance by Quakers, and piracy. *Id.*, 287.

[26]The constitutions of 48 states contain some provision against excessive punishment; wording of the prohibitions varies from 'cruel and unusual' to 'cruel or unusual' or simply 'cruel,' while a few state constitutions provide that penalties shall be proportioned to the nature or character of the offense. Connecticut and Vermont have no constitutional prohibition, but Conn. Gen. Stat. Ann. § 53-20 (1960) makes cruel or unlawful punishment a crime. With respect to the law of Vermont, see Vt. Stat. Ann. tit. 1, § 271 (1959), incorporating into local law the com-

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for petitioner's claim that the death penalty is uncon tutional when carried out without unnecessary cru as punishment for a serious offense such as murd

Former Justice Goldberg of this Court has no with reference to this Court's treatment of the Eigh Amendment's prohibition against cruel and unus punishment:

> "Indeed, the clause has been substantially d cussed—either by members of the majority or dissent on the Court—on only ten occasions. O three decisions since the adoption of the Bill Rights have interfered with a government's cho of punishments, and in only one of those we five Justices willing to invoke the clause. . . (Footnotes omitted.) Goldberg & Dershowit *Declaring the Death Penalty Unconstitutional,* Harv. L. Rev. 1773, 1777-78 (1970).

It was not until 1878 that this Court, in *Wilkerso v. Utah,* 99 U.S. 130, had occasion to discuss at an length the meaning of the constitutional prohibitio against cruel and unusual punishment. In that case th Court upheld the mode of execution (shooting) as no forbidden by the Constitution's prohibition agains cruel and unusual punishment, *id.,* 134-35, noting th

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mon law of England, which in turn prohibits cruel and unus punishment. . . . See also Vt. Const. ch. 1, art. 18, which i pliedly restrains the legislature and courts in this regard." Not *The Effectiveness of the Eighth Amendment: An Appraisal o Cruel and Unusual Punishment,* 36 N.Y.U. L. Rev. 846, 84 (n.7) (1961). *See also* Legislative Drafting Research Fun Columbia University, Index Digest of State Constitutions 34 (2d ed. 1959) and 1958-1964 Supp. at 71. California's provi sion states, "nor shall cruel or unusual punishments be inflicted." Cal. Const. art. I, § 6. Concurrently 41 States today retain th death penalty. U.S. Bureau of Prisons, National Prisoner Stati tics Bulletin: Capital Punishment 1930-1968 (August, 1969) at 30 (table 15).

"difficulty" in defining "the extent of the constitutional provision" but the applicability of the provision to "punishments of torture . . . and all others [involving] unnecessary cruelty." *Id.*, 136.

In 1890, the Court denied an application for writ of habeas corpus sought on an allegation that death by electrocution constituted a cruel and unusual punishment. *In re Kemmler*, 136 U.S. 436. The Court denied the application on the ground that the Eighth Amendment did not apply to state legislation, but added the comment:

> "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, *something more than the mere extinguishment of life.*" (Emphasis supplied.) *Id.*, 447.

In *Weems v. United States*, 217 U.S. 349, the Court, in 1910, for the first time overturned a punishment as cruel and unusual. In that case the defendant, upon conviction of falsifying an official document, had been sentenced to fifteen years of hard and painful labor to be served in wrist and ankle chains, with attendant life-long disabilities and a severe fine. *Id.*, 358, 364-65. The case arose under the Philippine Bill of Rights, whose prohibition against the "infliction of cruel and unusual punishment, was taken from the Constitution of the United States and must have the same meaning." *Id.*, 367.

The Court was not troubled by the circumstance that the punishment was somewhat novel in the context of the type of punishment to which the cruel and unusual

punishment clause was thought to apply, noting th the clause, like all principles, "to be vital must capable of wider application than the mischief whi gave it birth." *Id.*, 373.

Quoting Cooley's Constitutional Limitations, t Court stated that it was probable that " 'any punis ment declared by statute for an offense which w punishable the same way at common law could not regarded as cruel or unusual, in a constitutional sense.' *Id.*, 375.

In setting aside the punishment, the Court *Weems* noted that "[t]here are degrees of homicid that are not punished so severely," *id.*, 380, and tha the statute in question had no parallel in America legislation and came from a government of differen origins. *Id.*, 377. The Court found the statute "cruel i its excess of imprisonment and that which accompanie and follows imprisonment. It is unusual in its char acter. Its punishments come under the condemnatio of the bill of rights, both on account of their degre and kind." *Ibid.*

The 1947 case of *Francis v. Resweber*, 329 U.S. 459, presented the issue whether a pending second elec trocution of a condemned murderer, following an un successful first attempt at execution, constituted cruel and unusual punishment. The Court rejected the claim of unconstitutional punishment. In an opinion joined by three other members of the Court, Justice Reed in announcing the judgment of the Court discussed the issue "under the assumption, but without so deciding," that a violation of the Eighth Amendment would be violative of the Fourteenth Amendment's due process clause. *Id.*, 462. The opinion concluded:

"We find nothing in what took place here which amounts to cruel and unusual punishment in the constitutional sense. . . . The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment. The Fourteenth would prohibit by its due process clause execution by a state in a cruel manner. . . .

". . . The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, *not the necessary suffering involved in any method employed to extinguish life humanely. . . .*" (Emphasis supplied.) *Id.*, 463-64.

The next occasion on which this Court examined the scope of the Eighth Amendment's prohibition against cruel and unusual punishment was in 1958, in the case of *Trop v. Dulles*, 356 U.S. 86, where Chief Justice Warren, joined by three other members of the Court, concluded that denationalization of a native-born citizen for less than one day's desertion from military duty constituted unconstitutional punishment. Justice Brennan found the enactment of such punishment beyond the power of Congress to legislate, and four justices rejected both of these theories and would have upheld the statute upon which denationalization was premised.

Chief Justice Warren's opinion noted initially, "Since wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime."

Id., 99. *Cf. Williams v. Oklahoma*, 358 U.S. 576, 586-87.

While recognizing that the phrase cruel and unusual punishment was not precise, the opinion clarified the scope of the constitutional prohibition against such punishment by stating, "Fines, imprisonment and even execution may be imposed *depending upon the enormity of the crime*, but any technique outside the bounds of these *traditional penalties* is constitutionally suspect." (Emphasis supplied.) *Trop v. Dulles*, *supra* at 100. Thus the penalty in *Weems* was characterized as meeting the two-prong test of being "cruel in its excessiveness and unusual in its character," *id.*, as was the penalty in the case then before the Court. Stating that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," Chief Justice Warren concluded that denationalization, under the circumstances before the Court, constituted "a form of punishment more primitive than torture." *Id.*, 101.

Significantly, Chief Justice Warren's opinion stated:

> "At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. . . ." *Id.*, 99.

Thus the opinion, while recognizing "forceful" *legislative* arguments against the death penalty, rejected the

constitutional argument against that form of punishment.

Any doubt whether the Eighth Amendment's ban on cruel and unusual punishment applies to the States, through the operation of the Fourteenth Amendment, was dispelled in 1962 by the decision in *Robinson v. California,* 370 U.S. 660, invalidating punishment of imprisonment imposed on the defendant by reason of his being found to be addicted to narcotics.

The Court's opinion focused not on the nature of the punishment (ninety days in county jail), but on its inappropriateness as applied to a status, that of being a narcotic addict. *Id.,* 667.[27]

In 1968 this Court refused to extend its ruling in *Robinson* to the punishment (by fine of $50) of a defendant convicted of the crime of being intoxicated in a public place, *Powell v. Texas,* 392 U.S. 514, the plurality opinion of the Court distinguishing the punishing of *status,* involved in *Robinson,* from the punishing of the uncompelled *act* before the Court in *Powell. Id.,* 532-33.

If the decisions of this Court applying the cruel and unusual punishment clause are susceptible of synthesization into a consistent body of principles, the cases ap-

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[27]"To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But *the question cannot be answered in the abstract.* Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." (Emphasis supplied.) *Id.* "A punishment out of all proportion to the offense may bring it within the ban against 'cruel and unusual punishments.' . . . [T]he principle that would deny power to exact *capital* punishment for a *petty* crime would also deny power to punish a person by fine or imprisonment for being sick." (Emphasis supplied.) *Id.,* 676 (Douglas, J., concurring). "Cruel and unusual punishment results not from confinement, but from convicting the addict of a crime." *Ibid.*

pear to stand for the following propositions. Punishment will be held unconstitutional if it is *both* cruel *and* unusual either as (1) a punishment inherently cruel and inherently unusual in its *form*, or (2) a punishment not inherently cruel and unusual but *grossly excessive as applied* (a) in relation to the seriousness of a particular criminal act or (b) to any status which does not involve an uncompelled act.

Imposition of the death penalty for wilful homicide, in the present case first degree murder, clearly passes muster under the foregoing principles. Execution by means (such as the administration of lethal gas, here involved) which do not cause unnecessary pain or suffering is not an inherently cruel and unusual form of punishment.[28]

The method by which the punishment of death is effected in California is commonly recognized as more humane than the methods in use at the time the Eighth Amendment was adopted and appears to be frequently less cruel and painful than the death by natural causes that comes eventually to us all.[29] And the common use of the death penalty in this country, from the seventeenth century to the present, as indicated previously herein and at greater length in the pages that follow, renders the supreme penalty anything but "unusual."

Assuming then the validity of the death penalty as a form of punishment not intrinsically cruel and unusual

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[28]*Francis v. Resweber*, 329 U.S. 459, 463-64 (second attempt at electrocution); *In re Kemmler*, 136 U.S. 436, 447-49 (electrocution); *Wilkerson v. Utah*, 99 U.S. 130, 134-35 (shooting); *In re Anderson*, 69 Cal. 2d 613, 629-32 [447 P.2d 117, 128-30] (1968) (lethal gas).

[29]*See People v. Daugherty*, 40 Cal. 2d 876, 894-96 [256 P.2d 911, 922-23] (1953), *cert. denied*, 346 U.S. 827.

in its form, a remaining question is whether the penalty is unconstitutional under the foregoing principles as excessive in its application to first degree murderers, such as petitioner. The negative answer to this question need not be belabored since petitioner's offenses indisputably involved overt criminal conduct rather than status, and since, as petitioner concedes, if the death penalty may constitutionally be imposed for any civilian, peacetime crime, it can properly be imposed upon petitioner for first degree murder. (Pet. Br. p. 5.)

B. Capital Punishment Is Widely Accepted and Used in American Society and Comports With Contemporary "Standards of Decency"

Despite the relatively precise showing required by this Court, under the principles previously discussed, as justification for overturning an imposed punishment as cruel and unusual, something this Court has done in only three extreme situations in its history,[30] petitioner and amici have seized upon some of the language of the plurality opinion in *Trop v. Dulles,* 356 U.S. 86, as proof that that decision signaled the end of the right of the people of the various States to prescribe death as the punishment for first degree murder.

Almost ignoring the fact that the opinion in question went out of its way to recognize the continued constitutional validity of the death penalty, *id.,* 99, petitioner prophesizes that the use of the words "evolving standards of decency that mark the progress of a

[30]*Robinson v. California,* 370 U.S. 660 (punishing of status as narcotic addict); *Trop v. Dulles,* 356 U.S. 86 (punishment of denationalization, opinion of four members of the Court); and *Weems v. United States,* 217 U.S. 349 (punishment blatantly cruel and unusual both in the severity of its form and in its excessiveness in relation to the particular offense).

maturing society," *id.*, 101, sounded a talismanic death knell of three hundred years of capital punishment in this country. However, in all fairness to petitioner, his fixation with this phrase is understandable in view of its providing the only arguable escape from the historical reality of capital punishment's recognition as a legitimate penalty, outside the scope of cruel and unusual punishment, in the wording of the Constitution and in the law that preceded and followed adoption of that document and the Bill of Rights.

In his attempt "to avoid the impact of this history,"[31] petitioner has failed to demonstrate that anything that has transpired in the last thirteen years has impugned the validity of the observation, in 1958, that the death penalty "in a day when it is still widely accepted . . . cannot be said to violate the constitutional concept of cruelty." *Trop v. Dulles,* 356 U.S. 86, 99 (plurality opinion of Warren, C.J.).

The history of capital punishment in this country, and the deep-rooted origins of that form of punishment in the religious and moral heritage of contemporary Americans, provide clear indications that the death penalty is no barbaric relic of the past.

The history of the death penalty is as old as the history of man himself. Records of death as a punishment ordered by the state go back to ancient China, Assyria and early Egypt (as far back as 1500 B.C.), and the Greeks. The first record of capital punishment in England is from 450 B.C. Laurence, A History of Capital Punishment 1-2 (1932).

The reliance of some of *amici* on biblical references and religious principles, in support of their assertion

[31] *McGautha v. California,* 402 U.S. 183, 203.

that the death penalty is immoral and unjustified, is particularly inappropriate in light of the Old Testament's repeated recognition of the death penalty as a proper form of punishment. These references indicate a clear distinction between the sin of an individual's taking life and the right of the State to take the life of a murderer for the protection of society. Thus the Sixth Commandment, "Thou shalt not kill" (Holy Bible, Authorized King James Version, *Exodus* 20:13), is preceded by the admonition, "Whoso sheddeth man's blood, by man shall his blood be shed" (*id., Genesis* 9:6), and followed by numerous other references justifying the death penalty for murder,[32] including the decree, "He that smiteth a man, so that he die, shall be surely put to death." (*Id., Exodus* 21:12.) The New Testament as well contains references to the death penalty for murder.[33]

With reference to the Church's attitude toward the death penalty during the Middle Ages, a religious scholar has written in a Catholic periodical published in Los Angeles:

> "[I]ndividual Popes, theologians and councils of the Church have explicitly approved of it at different periods of history.
>
> ". . .
>
> "Pope Innocent the Third (1198-1216 A.D.) . . . reiterated this right. 'The secular power can inflict the death penalty,' the Pope remarked, 'without grievous sin.' (Denzinger, Enchridion No. 425).

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[32]*Id., Leviticus* 24:17, 21; *Numbers* 35:16-18, 30-31; *Deuteronomy* 19:11-12.

[33]*Id., St. Matthew* 5:21-22, 26:52; *St. John* 19:10-11; *Acts* 25:11; *Romans* 13:1-4; *Revelation* 13:10.

"And the Catechism of the Council of Trent observes that the state in executing this right is 'not only not guilty of murder, but eminently follows the law (the Fifth Commandment) which prohibits murder.' (Catechism of the Council of Trent, Part 3, Chap. 6, Q. 4)." The Tidings (February 13, 1959), p. 9.

The writings of other religious authorities confirm the fact that capital punishment is consistent with our Christian heritage. In the fifth century St. Augustine wrote "of the cases in which we may put men to death without incurring the guilt of murder." St. Augustine, City of God 27 [Book I, ch. 21] (Mod. Library ed. 1950). In the thirteenth century St. Thomas Aquinas wrote of the justification for the death penalty as a form of punishment. 2 Basic Writings of St. Thomas Aquinas 712 [Q. 87, Art. 3], 843-44 [Q. 100, Art. 8] (Pegis ed. 1945). Reference to philosophers (Plato, Pascal, Locke, Kant, Montesquieu, Rousseau), who over the centuries have written in support of the death penalty, are quoted in Allen, *Capital Punishment: A Matter of Human and Divine Justice*, The Police Chief, vol. 27 (March, 1960) at 1.

Despite the position that the foregoing religious and philosophical authorities occupied in the heritage of the Framers of the Constitution, and the bearing that they continue to have on our present-day beliefs and practices, petitioner implies that it is only police officers and prosecutors, presumably vengeful and out of step with "the evolving standards of decency that mark the progress of a maturing society,"[24] who are in favor of the death penalty today. (Pet. Br. 43.)

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[24] *Trop v. Dulles*, 356 U.S. 86, 101.

There are innumerable indicia of the general public's continued acceptance of the death penalty as a necessary form of punishment consistent with contemporary religious and moral standards of decency and the dignity of man.

Respondent wishes to emphasize its position that the meaning of the cruel and unusual punishment clause cannot expand and contract with the ebb and flow of something as fickle as public opinion as reflected in polls and surveys. Nevertheless since opponents of the death penalty have relied on such indicators in support of their contention that the death penalty is out of favor with all but the police, prosecutors, and a few misguided others, respondent feels compelled to put the lie to this contention. Public sentiment has swung strongly in favor of the death penalty since this Court, citing a 1966 Gallup Poll, characterized the United States as a "nation less than half of whose people believe in the death penalty." *Witherspoon v. Illinois*, 391 U.S. 510, 520. The most recent Gallup Poll and California Poll indicate the following attitudes of the public.

TABLE A

Public Opinion Polls on the Death Penalty

	Retain Captital Punishment	Abolish Captital Punishment	Qualified or No Opinion
California[55]			
1971 (August)	58%	34%	8%
1969	65%	26%	9%
1966	54%	30%	16%
1965	51%	39%	10%
1960	55%	35%	10%
United States[56]			
1969	51%	40%	9%
1966	42%	47%	11%
1965	45%	43%	12%
1960	51%	36%	13%

The most recent large-scale expression of public opinion, of which respondent is aware, occurred on Decem-

[55]The 1960-1969 figures are taken from Field Research Corporation, The California Poll (Release No. 635, May 22, 1969). The question posed to a "representative sample of Californians, numbering 1,011, in a survey taken early this month was the same one which has been asked of other representative samples over the years: 'As you know, this state has capital punishment—that is, execution—as a form of punishment for criminals. How do you personally feel about capital punishment—would you be in favor of doing away with the death sentence, or do you feel that the death sentence should be kept as a punishment for serious crimes, as it is now?'" *Ibid.* These figures are also reproduced in Erskine, *The Polls: Capital Punishment*, 34 Pub. Op. Q. 290, 295 (1970). The 1971 results, based on a sampling of the opinion of 508 persons, are taken from Field Research Corporation, The California Poll (Release No. 726, September 14, 1971).

[56]Gallup International Inc., Gallup Opinion Index 15-16 (Report No. 45, March, 1969). The question posed to "a minimum of 1,500 adults" approximately "2 or 3 weeks prior to publication," was "are you in favor of the death penalty for persons convicted of murder?" *Ibid.* The results of this poll are reproduced in Erskine, *The Polls: Capital Punishment*, 34 Pub. Op. Q. 290, 291-94 (1970).

ber 15, 1970, when the voters of the State of Illinois, in conjunction with a vote on whether to ratify the new constitution adopted by their constitutional convention, were asked to ballot as to whether the death penalty should be abolished in that jurisdiction. The following referendum results with respect to the latter question are probably a good indication of national sentiment in view of Illinois' position as a large State having substantial metropolitan and rural populations.

TABLE B

December 1970 Illinois Referendum on Whether to Abolish the Death Penalty[87]

	Votes	Percentages
Yes	676,302	35.7%
No	1,218,791	64.3%
Total	1,895,093	100%

The large majority of persons convinced of the need for capital punishment in America in recent years reflects a cross-section of the nation's population.[88] At the height of the unsuccessful campaign to abolish the death penalty in California, in the late 1950's and early 1960's, a Committee to Oppose Abolition of Capital Punishment was formed "to include in our numbers the vast majority of citizens who feel the abolition of the death penalty cannot serve the better interests of the California community."[89] Undoubtedly retail clerks, grocery and liquor store operators, pharmacists, bank tellers, gas station attendants, and others who like

[87]Illinois Secretary of State, Constitution of the State of Illinois and United States 13, 15 (1971).

[88]This proposition is supported by the reported breakdown of the figures produced in the national poll cited in n. 36, *infra*.

[89]Los Angeles Times, Part I, p. 8 (Feb. 14, 1959).

police officers have frequent occasion to look dow the "business end" of a robber's pistol or shotgu do not share petitioner's sentiment that the death pe alty is a barbaric relic of the past. And a recent meetin of the International Federation of Airline Pilots' Asso ciations in London demanded the death penalty fo airplane hijackers.[40]

Even the religious community is divided on the issue of capital punishment. At least two ministers have gone before California legislative committees to testify in favor of the death penalty, one of them a former chaplain at California's Folsom Prison,[41] and the 1967 biennial governing convention of the 2.8-million-member Lutheran Church Missouri Synod adopted a resolution stating, " 'Capital punishment is in accord with the Holy Scriptures and the Lutheran confessions.' "[42] The Associate Executive of the United Presbyterian Church in the United States has written in favor of capital punishment,[43] as have representatives of the Catholic

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[40]*Id.*, Part I, p. 20 (Dec. 18, 1969).

[41]*Id.*, Part I, p. 1 (Aug. 10, 1963); *Id.*, Part I, p. 5 (June 3, 1963). Representatives of the Protestant, Catholic, and Jewish faiths testified in favor of the death penalty in Florida. Florida Special Comm'n for the Study of Abolition of Death Penalty in Capital Cases, Report 31 (1965).

[42]Los Angeles Times, Part III, p. 8 (July 15, 1967).

[43]Vellenga, *Christianity and the Death Penalty*, in Bedau, The Death Penalty in America (rev. ed. 1967) 123, 129, reprinted from *Is Capital Punishment Wrong?*, Christianity Today, vol. IV, no. 1 (October 12, 1959), at 7-9: "No one can deny that the execution of a murder is a horrible spectacle. But we must not forget that murder is more horrible. . . . The law of capital punishment must stand as a silent but powerful witness to the sacredness of God-given life. Words are not enough to show that life is sacred. Active justice must be administered when the sacredness of life is violated."

Church[44] and noted contemporary scholars and philosophers.[45]

The death penalty is also favored by those who have the most extensive contact with the criminal element, law enforcement[46] and correctional officers.[47] Significantly, on September 14, 1971, the Conference of Delegates of the State Bar of California voted to support the retention of capital punishment, reversing its stand of two years earlier.[48]

In short, contrary to the impression that petitioner seeks to convey, there appears to be substantial support for the death penalty in almost all social, eco-

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[44]*E.g.*, Father John V. Sheridan in The Tidings, *supra* at 9 (February 13, 1959).

[45]*E.g.*, Jacques Barzun, Dean of Faculties and Provost of Columbia University, in Barzun, *In Favor of Capital Punishment*, in Bedau, The Death Penalty in America (rev. ed. 1967) 154, reprinted from The American Scholar, vol. 31, no. 2 (Spring 1962), at 181-91; and Sidney Hook, Professor of Philosophy and Chairman of the Graduate Philosophy Department at New York University, in Hook, *The Death Sentence*, *id.*, at 146, reprinted from The New Leader, vol. 44 (April 3, 1961), at 18-20.

[46]*E.g.*, J. Edgar Hoover, *Statements in Favor of the Death Penalty*, *id.*, 130, reprinted from law enforcement publications; and the Chief of Police of Santa Ana, California, writing in Allen, *Capital Punishment: Your Protection and Mine*, *id.*, at 135, reprinted from The Police Chief, vol. 27 (June, 1960) at 22, the official publication of the International Association of Chiefs of Police; Allen, *Capital Punishment: A Matter of Human and Divine Justice*, The Police Chief, vol. 27 (March, 1960) at 1. Associations of peace officers and district attorneys again opposed abolition of the death penalty before the California Legislature this year. Los Angeles Times, Part I, pp. 3, 24 (June 23, 1971).

[47]*E.g.*, The Prison Officers Assn. of Great Britain has demanded the return of the death penalty, stating that "since abolition of capital punishment . . ., 'There is nothing to deter the growing number of long-term criminals from killing prison officers in an attempt to escape.'" Los Angeles Times, Part I, p. 21 (Nov. 16, 1966).

[48]Los Angeles Times, Part I, p. 1 (September 15, 1971).

nomic, and occupational groups, and indeed the preponderance of public opinion is in favor of retaining the death penalty as one of the alternative forms of punishment available for serious offenses.

Thus it is highly misleading for *amicus curiae* the American Civil Liberties Union to quote from only selected portions of the transcript of a trial (in which one of counsel for such amicus appeared as counsel of record), without reference to any of the *contrary* testimony, in an effort to convey the impression that the evidence at such proceedings establishes the unconstitutionality of the death penalty. That evidence, which was never before the state courts at trial or on appeal in the present case, is extensively referred to throughout the brief of amicus.[49]

Thus while respondent deems it inappropriate to argue the evidence presented in that collateral proceeding,[50] the following information is conveyed in order to correct the misimpression created by amicus. In addition to the ten defense witnesses who appeared before the trial court at the hearing to determine the constitutionality of the death penalty, fifteen prosecution witnesses appeared and testified in support of capital punishment. These supporters of capital punishment included a Presbyterian minister (who as a former correctional officer at San Quentin had witnessed executions and been on duty on Death Row), a

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[49]At pp. 8-9, 14, 15(n.10), 17-18(n.27), 19(n.28), 20 (n.34), 21-22(nn.35, 36), 24-28, 29(n.46), 31, 35-37, 44(n. 61) and the entire Appendix A to said brief (pp. 1a through 58a).

[50]*People v. Thornton*, Los Angeles Superior Court No. 323-445, presently pending before the California Supreme Court.

Catholic priest, a psychiatrist, an eminent professor of law, a defense attorney formerly against the death penalty who previously as a deputy district attorney had prosecuted a robber who had moved his operations to a non-death-penalty State because of fear of that punishment, a state senator, a state assemblyman, two chiefs of police, a chief of detectives, a former deputy sheriff who heard two criminal suspects tell a news reporter that fear of the death penalty had kept them from killing the arresting officers, an undercover officer who overheard a criminal (unaware of the officer's identity) advise a cohort not to murder because there was the risk of the death penalty, the wife of a grocery store owner who heard a robber make a similar statement to a cohort during the course of a holdup, a former president of the county medical association whose colleague had a similar experience, and the present warden of San Quentin Prison who testified as to death row inmates receiving meals superior to those given the general prison population, and regarding other favorable aspects of the living arrangements on death row, the general opinion of prison personnel that their work would be almost impossible without the death penalty, and the request (granted) of a non-capital inmate upon his release to be shown the gas chamber as a reminder never to commit murder. Upon the conclusion of the foregoing proceedings the trial court made findings of fact and stated conclusions of law rejecting the position of amicus.

The popular sentiment in favor of the death penalty as a necessary form of punishment is reflected in the number of American jurisdictions retaining the supreme penalty: the federal government, the District of Columbia and forty-one of the fifty States (eight of which

experimented for varying periods with abolition of the death penalty, only to restore it, Delaware as recently as 1961).[51]

In California, at least, the introduction and defeat of a bill to abolish the death penalty has become an almost annual ritual. Such a bill was again defeated by the Legislature in 1970.[52] In contrast a new capital offense was added to the California Penal Code in 1970,[53] and bills are before the 1971 California Legislature which would add additional capital offenses.[54] After extensive study, the staff of a California legislative committee has recommended that a revised penal code retain capital punishment.[55] And two additional federal capital offenses were enacted as recently as 1965 and 1961.[56]

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[51]U.S. Bureau of Prisons, National Prisoner Statistics Bulletin: Capital Punishment 1930-1968 (August, 1969) at 30 (Table 15).

[52]California Legislature, Final Calendar of Legislative Business: Regular Session 1970, Assembly Final History 52 (Bill 20). *See also People v. Love*, 56 Cal.2d 720, 737-38 [366 P. 2d 33, 42] (1961) (McComb, J., dissenting).

[53]Section 12310, explosion or ignition of a destructive device or explosive causing mayhem or great bodily injury.

[54]Assembly Bill 619 would make it a capital offense to assault a peace officer or fireman and thereby proximately cause his death. Assembly Bill 1525 would make it a capital offense to kidnap any elected public officer. Senate Bill 112, passed by the Senate and sent to the Assembly, would provide for an automatic finding of first degree murder for any person convicted of committing murder of a peace officer. California Legislature, Legislative Index (August 17, 1971); California Legislature, Senate Weekly History (September 17, 1971).

[55]State of California, Joint Legislative Committee for Revision of the Penal Code, The Criminal Code §315(a)(1) (Staff Draft) 18-19 (1971).

[56]18 U.S.C. § 1751 (assassination of the President, Vice President or other officer in the line of succession); 49 U.S.C. § 1472(i) (aircraft piracy).

It is ridiculous for petitioner and amici to focus upon the small number of executions in recent years as an indicator of declining popular acceptance of the death penalty, when it is common knowledge that these figures are the result of reversals and stays of execution granted by state[57] and federal courts, including this Court, during the pendency of various legal challenges to the death penalty made in cases such as *Maxwell v. Bishop*, 398 U.S. 262; *McGautha v. California*, 402 U.S. 183, and the case at bar.

A much more accurate barometer of the "evolving standards of decency that mark the progress of a maturing society"[58] is the constant number of defendants whom juries annually send to the nation's prison systems under sentence of death, as indicated in the following figures.

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[57]*See, e.g., People v. Goodridge*, 70 Cal. 2d 824, 839 [452 P. 2d 637, 646] (1969): "Although defendant had not challenged the constitutionality of the death penalty, this court delayed filing its opinion in this case until that question was resolved in In re Anderson, 69 Cal.2d 613 [. . . 447 P.2d 117]. This court further delayed action in all pending automatic appeals to permit defendants to challenge the composition of the jury following Witherspoon v. Illinois, 391 U.S. 510. . . ."

[58]*Trop v. Dulles*, 356 U.S. 86, 101 (plurality opinion of Warren, C.J.).

TABLE C

Number of Prisoners Received in Prison Under Death Sentence

	California[59]	United States[60]
1970	36	—
1969	14	—
1968	27	102
1967	20	85
1966	27	118
1965	22	86
1964	19	106
1963	24	93
1962	21	103
1961	20	140

The foregoing figures with respect to the imposition of capital punishment are hardly indicative of "extreme contemporary rarity resulting from a demonstratable historical movement which can only be interpreted fairly as a mounting and today virtually universal repudiation." (Pet. Br. p. 12.)

Respondent questions, and fails to perceive the relevancy of, petitioner's assertion that "there is evident a definite, continuing, long-term, accelerating, worldwide

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[59]California Department of Corrections, California Prisoners 1968 (June, 1969), at 92 (Table 35) (the latest edition of this publication available at the present time). The 1969 and 1970 figures are statistics from the files of the Department destined for publication in the next two editions.

[60]U.S. Bureau of Prisons, National Prisoner Statistics Bulletin: Capital Punishment 1930-1968 (August, 1969) at 12 (Table 4) (the latest edition of this publication available at the present time).

trend toward ending the use of the penalty of death."[61] (Pet. Br. 4e.) That is a frail foundation upon which to postulate the unconstitutionality of the death penalty. This Court's interpretation in 1971 of what the Framers of the Eighth Amendment had in mind in 1789 can hardly be affected by petitioner's characterization of Liechtenstein, Luxembourg, Nicaragua, and Surinam as having *de facto* abolished the death penalty. (Pet. Br. 2e.) Suffice it to say that (1) the total number of nations which are abolitionist *de jure* or *de facto* represents a distinct minority in the world community,[62] (2) the conditions that lead a jurisdiction to conclude that a particular punishment is or is not required for the protection of its populace vary from nation to nation,[63] as they vary from State to State within our own federal republic, and (3) petitioner has not pointed to any abolitionist nation which has rejected the death penalty by judicial declaration of unconstitutionality. In any event, "[o]n the evidence

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[61]"A trend requires a base, and movement from it. . . . Inspection of the cited data reveals, however, no base and no movement, only a description of the present legislative situation. . . . [I]f, as appears to be true, for a number of years the situation has been relatively stable, . . . then it is hard to see how 'evolving standards of decency' . . . can be said to be violated." Packer, Comment, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071, 1073-74 (1964).

[62]United Nations, Department of Economic and Social Affairs, Capital Punishment 9-11, 83-85 (1968). Included among the nations retaining the death penalty are countries as civilized as ours (*e.g.*, France, Spain, Australia, and Japan). *Id.*, 9, 83.

[63]Compare the following remarks of one of the justices who acquitted seven persons in Papua-New Guinea this year of a charge of cannibalism: "[C]annibalism was not improper or indecent in the men's community. One cannot conceive that the legislature would have intended to impose uniform standards of decency and propriety on all the peoples of this country." Los Angeles Times, Part I, p. 15 (Aug. 12, 1971).

available it does not appear that this is a case for due process by head count."[64]

If indeed the "relevant Eighth Amendment touchstone is the judgment of enlightened public opinion" (Pet. Br. 24(n.40)), then what more enlightened assemblage could there be than the twelve jurors in the hundreds of pending capital cases who on the basis of the evidence presented to them in court solemnly exercised their judgment on the ultimate question whether the defendant was "fit to live."[65] As this Court has recognized, "one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system." *Witherspoon v. Illinois*, 391 U.S. 510, 519(n. 15). "In our criminal courts the jury sits as the representative of the community; its voice is that of the society against which the crime was committed." *Williams v. New York*, 337 U.S. 241, 253 (Murphy, J., dissenting).

The specter often raised of a wholesale bloodbath in the event all of the 600 to 700 prisoners under sentence of death were to be executed in the coming year is first of all irrelevant to a *constitutional* determination of whether the States remain free to decree that alternate punishment for murder. Also irrelevant in the present context is whether it costs more to execute a man than to keep him alive; and whether capital cases have an adverse effect on our court system.

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[64]Packer, *supra*, at 1074. "Of course it is true that by the middle of the nineteenth century the very considerable list of capital offenses in most jurisdictions had been cut down to a much smaller number. (Citation.) But that movement appears to have ended by about 1900." *Id.*, 1073(n. 9.)

[65]*Witherspoon v. Illinois*, 391 U.S. 510, 521(n.20); *People v. Morse*, 60 Cal. 2d 631, 647 [388 P.2d 33, 43] (1964).

Such considerations bear solely on the *legislative* desirability of the death penalty. Secondly the specter of mass execution is an unrealistic parade of horribles. By way of example, only 25 of the 102 prisoners on death row in California have had their judgments of conviction imposing the death penalty affirmed by the California Supreme Court; the remainder have yet to have their cases reviewed on automatic appeal[66] or instead are awaiting new trials on the issue of penalty. California State Prison at San Quentin, Execution Data (September 1, 1971). Of those 25 a great number have petitions for writ of certiorari pending in addition to future clemency hearings[67] and issues available upon which to base collateral proceedings in the state and lower federal courts.

Respondent fails to comprehend how the length of the average inmate's confinement on death row can render his ultimate execution cruel and unusual, particularly since part of the delay in carrying out the judgment is occasioned by the States' desire for a full and adequate appellate review of the proceedings which led

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[66]Cal. Pen. Code §1239 (providing for an automatic appeal since 1935). Under this section review of the case and reversal may occur even contrary to the defendant's wishes. *People v. Stanworth*, 71 Cal. 2d 820, 832-35 [457 P.2d 889, 895-900] (1969). The California Supreme Court considers itself bound to review the record for errors not raised by the defendant when the case is a capital one. *See People v. Goodridge*, 70 Cal. 2d 824, 839 [452 P.2d 637, 646-47] (1969); *People v. Robinson*, 61 Cal. 2d 373, 388(n.14) [392 P.2d 970, 979] (1964). If the California Supreme Court's review of these cases follows the pattern of the past six years, the majority of these individuals will have their judgments imposing the death penalty reversed or modified to impose a life sentence. See *infra*, Appendix p. 1, Table H.

[67]Petitioner recognizes that "governors will almost never give consideration to commutation in a capital case while judicial proceedings are pending. . . ." (Pet. Br. 40 (n.78)).

to the imposition of the death sentence. Innovative decisions by this Court and other federal and state courts have contributed to lengthening the appellate and collateral review of capital cases, and thereby to increasing the median elapsed time of prisoners on death row in the various jurisdictions from 14.4 months at the end of 1961 to 33.3 months at the end of 1968.[49] Some of this delay may be a temporary phenomenon rather than an unavoidable characteristic of our judicial system. But thus a large part of the delay has been for the benefit of the condemned prisoners, who would be the first to complain of undue haste if they were accorded less due process on review of their judgments of death.[50] However, in addition to the foregoing meaningful review, there are countless frivolous actions filed by such inmates which, in conjunction with stay applications filed therewith, result in the

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[49]U.S. Bureau of Prisons, National Prisoner Statistics Bulletin Capital Punishment 1930-1968 (August, 1969) at 12 (Table 4).

[50]The course of two California cases through the official reports is illustrative of why it takes so long for the judgment in a capital case to become final: (1) *People v. Seiterle*, 56 Cal. 2d 320 [363 P.2d 913] (1961); *Seiterle v. Superior Court*, 57 Cal. 2d 397 [369 P.2d 697] (1962); *People v. Seiterle*, 59 Cal. 2d 703 [381 P.2d 947] (1963), *cert. denied*, 375 U.S. 887; *In re Seiterle*, 61 Cal. 2d 651 [394 P.2d 556] (1964), *cert. denied*, 379 U.S. 992; *People v. Seiterle*, 65 Cal. 2d 333 [420 P.2d 217] (1966), *cert. denied*, 387 U.S. 912; *In re Seiterle*, 71 Cal. 2d 698 [456 P.2d 129] (1969); (2) *People v. Terry*, 57 Cal. 2d 538 [370 P.2d 985] (1962), *cert. denied*, 375 U.S. 96[illegible]; *People v. Terry*, 61 Cal. 2d 137 [390 P.2d 381] (1964), *cert. denied*, 379 U.S. 866; *People v. Terry*, 70 Cal. 2d 410 [45[illegible] P.2d 36] (1969), *cert. denied*, 399 U.S. 811; *In re Terry*, 4 Cal. 3d 911 [484 P.2d 1375] (1971); fifth retrial of the issue of penalty is presently pending in Los Angeles Superior Court. *Id.*, 915 [484 P.2d at 1378-79]. *See also* the chronology set forth in *United States ex rel. Townsend v. Twomey*, 322 F. Supp. 158, 160-61 (N.D. Ill. 1971.)

setting aside of execution dates previously fixed."[72] In other words the State does not purposefully, or even negligently, subject the inmate to an unduly long period of pre-execution incarceration on death row; it is often the inmate, unsatisfied with a full and adequate appellate review, who himself prolongs his time on death row to that extreme length which places in disrepute the entire system of administration of justice."

Nor is there anything cruel and unusual in the physical surroundings of the men awaiting execution, as is evident from a recent article in the New York Times authored by one of the inmates on San Quentin's death row.[73] Further detail regarding the routine of these men is provided below.[74]

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[72]In California an execution date is set 60-90 days after the initial appeal is determined and 30-60 days after any subsequent appeal is determined. Cal. Pen. Code §§ 1193, 1227.

[73]One study contains suggestions as to how the "unnecessarily slow process" in capital cases could be expedited. *Post-Conviction Remedies in California Death Penalty Cases*, 11 Stan. L. Rev. 94, 132-35 (1958.)

[74]Welch, *San Quentin's Death House*, New York Times, p. 31 (July 23, 1971): "Disregarding the omnipresent fear of the gas chamber, our living conditions aren't so bad. By prison standards the food is good, although we're only fed two meals a day. [Sandwiches are provided at the second meal for a later snack in the evening.] We have TV's and piped in radio. We can take educational courses and order nearly any type book, magazine or newspaper.

"We're allowed visitors, can write and receive letters from anyone, and can also write for publication. We can buy typewriters, commissary items, and stationery from outside sources. Our exercise period lasts three and half hours each day, and we get to take showers twice a week.

"On the other hand, the only time we get sunshine is walking to and from a visit. [The other two units of death row, where inmates requiring less security are housed, are given their exer-

(Footnotes 72 and 73 continued on following page)

In summary, respondent submits that the death penalty is consistent with "evolving standards of decency that mark the progress of a maturing society,"[74] in that all but nine of the fifty States, plus a majority of persons, representing many segments of our society, have concluded that such punishment is necessary for the protection of society. Capital punishment is neither inherently cruel and unusual *per se*, nor cruel and unusual in the manner by which it is imposed, or in relation to the crime of murder. Nor do the length or nature of pre-execution confinement bring capital punishment within the "[p]rohibition against the wanton infliction of pain" contained in the Fourteenth Amendment insofar as it incorporates the Eighth Amendment. *Francis* v. *Resweber*, 329 U.S. 459, 463; *In re Anderson*, 69 Cal. 2d 613, 632 [447 P.2d 117, 130] (1968); *People v. Chessman*, 52 Cal. 2d 467, 498-99 [341 P.2d 679, 699-700] (1959), *cert. denied*, 361 U.S. 925.

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cise period in an outside yard.] Our safety razors are equipped with locks so the blades can't be removed. Our cells are searched periodically for weapons and contraband, and during exercise we are watched constantly by a guard with a rifle." (Bracketed material supplied by respondent.)

[73]"Between 10:30 A.M. and 2:00 P.M., all men are released from their cells for exercise in the corridor extending the length of the Unit. A punching bag, ping pong, card table and games are provided. . . . Men have TV, radio outlets, and library books and newspapers as cell activities. Many men do extensive legal work and some take academic correspondence courses. They receive visits from attorneys, relatives and friends, of long standing. Due to retrials and court-granted stays of execution, the average length of time on condemned status is increasing with nearly half the men having a tenure of over two years. . . ." California State Prison at San Quentin, Capital Punishment in California 3 (August 1, 1970).

[74]*Trop v. Dulles*, 356 U.S. 86, 101 (plurality opinion of Warren, C.J.).

In view of the common use and acceptance of capital punishment during the entire history of our nation, up to and through the present, it is appropriate to join in the following observation by Justice Holmes for a unanimous Court:

"The 14th Amendment, itself a historical product, did not destroy history for the states, and substitute mechanical compartments of law, all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the 14th Amendment to affect it." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31.[15] Respondent submits, on the basis of this argument and those that follow, that petitioner has failed to make his case against the constitutionality of the death penalty.

C. In View of Petitioner's Inability to Make a Clear Showing That the Death Penalty Serves No Legitimate Function, the Federal Constitution Leaves the People of the State of California Free to Determine Through Their Elected Representatives That the Protection of Society Under Present Conditions Requires Death as a Form of Punishment for Certain Serious Offenses

One facet of petitioner's attack on the constitutionality of the death penalty is his assertion that no social interest is served by the state's putting a man to death that could not be served as well by a term of life imprisonment, and that therefore the death penalty constitutes "unnecessary cruelty".[16] (Pet. Br. 56.)

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[15] *See also Coolidge v. New Hampshire*, ... U.S. ...., 91 S. Ct. 2022, 2053 (Black, J., dissenting); *McGautha v. California*, 402 U.S. 183, 203; *Walz v. Tax Commission*, 397 U.S. 664, 678.

[16] *Weems v. United States*, 217 U.S. 349, 370.

Respondent submits that this assertion again st
a matter for the consideration of a legislative body
not for a Court called upon to determine whethe
particular mode of punishment is constitutionally
hibited to the States. Assuming, as demonstrated in
preceding arguments, that petitioner's judgment
sentence of death is neither cruel and unusual *per*
nor cruel and unusual in the mode in which it i
be carried out or in relation to petitioner's crime
murder, respondent is hard pressed to comprehend
a constitutional issue is raised by petitioner's claim
alternative remedies to capital punishment are avail
to the state and federal governments, much less
such an allegation raises an issue of cruel and unu
punishment.

The reliance of petitioner and *amici* on selec
sociological, penological, and psychiatric findings
supposed proof of the social inutility of the de
penalty, evokes the observation that

> ". . . questions for this Court are not settled
> reference to medicine or penology. Our task
> to determine whether the principles embodied
> the Constitution of the United States place
> limitations upon the circumstances under wh
> punishment may be inflicted, and, if so, wheth
> in the case now before us, those principles
> clude the imposition of such punishment."
>
> *Powell v. Texas*, 392 U.S. 514, 565-66 (Fort
> J., dissenting).

Turning to the merits of petitioner's assertion, it
readily apparent that petitioner has grossly overstat
his case in concluding that there is absolutely no s
stantial evidence that the protection of society is furth

ed by the imposition of the death penalty for serious offenses. From his treatment of some of the studies that have been made on this subject, it appears that petitioner views it to be an established fact that the death penalty accomplishes no legitimate social function. (Pet. Br., App. H.)

For reasons which will be set forth at greater length at the conclusion of this argument, respondent does not view its present task as encompassing conclusive proof of the social utility of capital punishment. Aside from the fact that such a showing can be, and has been, more appropriately and effectively attempted in the legislative arena, it is submitted that the burden, if any, which respondent must assume in the judicial setting of an attack on the constitutionality of the death penalty, is only to demonstrate that there is in fact a basis upon which the California Legislature could reasonably conclude that certain serious offenses[77] should be punishable by death.

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[77]There are eight capital offenses in California: (1) first degree murder (Cal. Pen. Code § 190), (2) kidnaping for gain with bodily harm (Cal. Pen. Code § 209), (3) assault with a deadly weapon by a life prisoner (Cal. Pen. Code § 4500), (4) explosion or ignition of a destructive device or explosive causing mayhem or great bodily injury (Cal. Pen. Code § 12310, enacted in 1970), (5) treason (Cal. Pen. Code § 37), (6) sabotage of war or defense effort causing death or great bodily injury (Cal. Mil. & Vet. Code §§ 1670, 1672(a)), (7) train wrecking (Cal. Pen. Code § 219), and (8) procurement of the conviction and execution of any innocent person by perjury or subornation of perjury (Cal. Pen. Code § 128). The death penalty is mandatory for the offenses listed (6) and (7), as well as for the offense listed (3) when the commission thereof results in the death of a non-inmate victim. However, since 1893, when the State assumed the sheriffs' responsibility for conducting executions and complete records became available, executions have been limited to persons convicted of first degree murder, aggravated kidnaping, and assault with a deadly weapon by a life

(This footnote is continued on next page)

The objectives of punishment, whose furtherance t
California Legislature entrusts to the trier of fact
capital cases, were set forth by the California Supre
Court in an opinion defining the awesome and compl
task conferred upon the jury in such a case:

> "[I]n deciding the question whether the accus
> should be put to death or sentenced to imprisc
> ment for life it is within their discretion alone
> determine, each for himself, how far he will a
> cord weight to the considerations of the several o
> jectives of punishment, of the deterrence of crim
> of the protection of society, of the desirability
> stern retribution, or of sympathy or clemency,
> age, sex, human passion, ignorance or weakne
> or (if appropriate under the evidence, of illness
> intoxication or provocation not sufficient to r
> duce the degree or class of the crime), of the pr
> sumptions concerning, or possible uncertainti

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prisoner. Of the 292 executions in California since 1930, 2
were for first degree murder, 6 for aggravated kidnaping, and
for assault with a deadly weapon by a life prisoner. U.S. Bure
of Prisons, National Prisoner Statistics Bulletin: Capital Punis
ment 1930-1968 (August, 1969) at 11 (Table 3); *Hearin*
Before the Subcommittee on Criminal Laws and Procedures
the Senate Committee on the Judiciary on S. 1760, to Aboli
the Death Penalty, 90th Cong., 2d Sess. 212-18 (1970). T
records of the California State Prison at San Quentin indica
that as of September 1, 1971, there were 91 men and 4 wom
under death sentence for murder, 4 men under death senten
for assault with a deadly weapon by a life prisoner, havi
no other death sentence, and 3 men under death senten
for aggravated kidnaping having no other death sentenc
Much of the force of the capital offense listed as (2) w
sapped by the decision in *People v. Daniels*, 71 Cal. 2d 111
1139 [459 P.2d 225, 238] (1969), excluding from the oper
tion of California Penal Code section 209 those kidnapin
which are solely to facilitate, and are merely incidental to, t
crime of robbery, where the movement of the victim does n
substantially increase the risk of harm. The *Daniels* decision h
been applied fully retroactively. *People v. Mutch*, 4 Cal. 3d 38
394-96 [482 P.2d 633, 636-37] (1971).

attaching to, life imprisonment, or of the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever which in the light of the evidence, the duty they owe to the accused and to the state, and the law as explained to them by the judge, appears to them to be important."[78]

People v. Friend, 47 Cal. 2d 749, 767-68 [306 P.2d 463, 474-75] (1957).

See also Williams v. New York, 337 U.S. 241, 248;[79]

Winston v. United States, 172 U.S. 303, 313, quoted in *McGautha v. California*, 402 U.S. 183, 200-01.

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[78]Lord Justice Denning testified before the British Royal Commission on Capital Punishment, "The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objectives of punishment as being deterrent or reformative or preventive and nothing else. . . . The ultimate justification of any punishment is . . . that it is the emphatic denunciation by the community of a crime; and . . . there are some murders which . . . demand the most emphatic denunciation of all, namely the death penalty." Quoted in National Commission on Reform of Federal Criminal Laws, 2 Working Papers 1359 (n.47) (1970).

[79]While "rehabilitation of offenders" has become the primary goal of criminal jurisprudence, "retribution" is still a permissible consideration albeit "no longer the dominant objective." *Williams v. New York, supra* at 248 and n.13. "Description, even approval, of the prevailing mood of penal philosophy (*sed quaere:* whose mood?) is one thing; its elevation to constitutional dogma is quite another." Packer, Comment, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071, 1078(n.21) (1964). "This Court has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects," *Powell v. Texas*, 392 U.S. 514, 530 (plurality opinion of Marshall, J.)

Stripped down to their basic elements, the per
sible objectives of punishment are reduced to f
(1) deterrence, (2) incapacitation (or isolation),
rehabilitation, and (4) retribution.[80] "Retribut
aside, the rational justification for punishment is
dinarily thought to be its utilitarian propensity to p
vent or diminish the commission of offenses, thro
deterrence, incapacitation, rehabilitation, or some co
bination of these."[81]

Rehabilitation of the murderer sentenced to de
is, of course, just as impossible as protection of
absent member of society victimized by the offend
However, petitioner should find little sustenance
his argument in this circumstance, in view of the "da
underside to the rehabilitative ideal." Since, acco
ing to this ideal, the proper aim of the punitive proc
is to reform the criminal so that he may re-enter socie
as a useful member, the permanent incapacitation
the dangerous, unreformable criminal by life term i
prisonment no more serves the rehabilitative aim th
does the death penalty.[82]

What, then, of deterrence—has petitioner concl
sively established that the death penalty deters no si
nificantly greater number of persons from committin
murder than does the prospect of life imprisonment

Before proceeding to the merits of petitioner's alleg
tions, which are founded principally on the sociologica
studies of Professor Sellin (Pet. Br., App. H), it seem

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[80]*Rudolph v. Alabama*, 375 U.S. 889, 891 (dissentin
opinion of Goldberg, J.); *Trop v. Dulles*, 356 U.S. 86, 111 (con
curring opinion of Brennan, J.); *Williams v. New York*, 33
U.S. 241, 248.

[81]Packer, *supra* at 1079.

[82]Packer, *supra* at 1081.

appropriate to join in the following observation by Professor Packer:

> "The legislative judgment inherent in provisions for the death penalty may be open to question, but that hardly seems enough to make it impermissible. One may wonder whether a constitution that 'does not enact Mr. Herbert Spencer's Social Statics' can fruitfully be thought of as enacting Mr. Thorsten Sellin on the death penalty."[83]

The studies upon which petitioner relies conclude that the death penalty exerts no discernable influence on the rate of homicides. The truism that one may prove almost anything with statistics is a circumstance that makes one particularly concerned, in a matter as fraught with strong feelings as the desirability of the death penalty, that the statistician be totally objective and free of bias.[84]

Aside from the shadow which this caveat casts across the findings of non-deterrence, or more accurately the absence of findings of deterrence, a question arises as to the efficacy of the statistical approach in an area as imbued with imponderables as the question of human motivation toward criminal conduct.[85] Social and economic conditions, such as population pressure, unemployment rate, influx of racial and ethnic minorities, in addition to such factors as the efficacy of local law enforcement, climate and weather, and the number of attractive crime targets, must all play a sig-

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[83]Packer, *supra* at 1079-80 (footnote omitted).

[84]Some of the inherent weaknesses in a statistical approach are indicated in the opinion in *Maxwell v. Bishop* 398 F.2d 138 (8th Cir. 1968), *vac'd*, 398 U.S. 262.

[85]*See* Van Den Haag, *Deterrence and the Death Penalty*, 60 J. Crim. L.C. & P.S. 141, 145-46 (1969).

nificant role in determining the number of homicid (particularly robbery-homicides) committed in a giv jurisdiction in a given period of time. The existence so many influential factors, not susceptible of measur ment and correlation, impugns the statistical metho ology upon which petitioner places so much reliance Clearly, the existence of these variables precludes meaningful comparison between general undifferentiate murder statistics and a single proposed causual factor that of the existence of the death penalty in the partic ular jurisdiction.[86]

Secondly, the steady increase in homicides acros the nation,[87] presumably caused by a multitude o social and economic factors, naturally tends to cove

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[86]"It is indeed obvious that a statistical change cannot safely be ascribed to a particular explanation without making sure that no other explanations exist which, either alone or in conjunction with each other or the suggested explanation, could account for the change. And it is impossible to be sure that variations in homicide statistics before and after the abolition of capital punishment are in fact due to abolition, or that, if the figures remain constant, abolition did not have some effect which was cancelled out by some other cause. . . .

"This truth applies to any comparison of the position in a single country at different times; it applies even more to any comparison between different countries, where differences of character, behavior and outlook and different methods of compiling statistics present additional complications. Moreover, in any comparison between countries, it is necessary to establish that the crimes which are compared are identical, and this is rarely possible. If, for example, an attempt were made to compare the murder rate in England, Belgium and the Netherlands, it would be found that 'murder' means something different in each country. . . ." Royal Commission on Capital Punishment 1949-1953 Report 340 (1953).

[87]Murder increased 76% in 1970 over 1960, and the rate of murder per 100 000 inhabitants increased 56% during that period. These rates appear to be increasing in all geographical areas of the country and in metropolitan, suburban, and rural areas. Federal Bureau of Investigation, Uniform Crime Reports—1970 (August 31, 1971) at 7-8.

up the perceptible deterrent effects of the death penalty which might appear in the antiseptic conditions of a social laboratory.

A third objection to the statistical approach is that it measures the homicide rate in terms of the *theoretical* existence of the death penalty (*i.e.*, existing statutes and judgments imposing the punishment of death) rather than in terms of the *actual* existence of the death penalty (*i.e.*, executions carried out). During the previous decade in which the dramatic increase in murders was recorded, as indicated in the preceding footnote, while juries continued at a relatively stable rate to fix the penalty at death[88] the annual number of executions in the United States dwindled from 56 to 0.[89] In this context respondent concurs in petitioner's apparent view (Pet. Br. 6h-7h) that the death penalty would be an even greater deterrent were it not for the inordinate delay existing in the courts today which precludes the application of swift punishment to the offender. Interestingly enough, the homicide rate in California was relatively stable from 1953 to 1963, alternating between 3.3 and 4.0 per 100,000 population. In 1963, the year of the last execution except for the one in 1967, the rate was 3.8. The rate has since climbed to 6.0 in 1968 and 6.9 in 1969.[90]

A fourth possible flaw in the statistical approach arises from the vast majority of the States having the

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[88]U.S. Bureau of Prisons, National Prisoner Statistics Bulletin: Capital Punishment 1930-1968 (August, 1969) at 12 (Table 4). *See* Table C, *infra*, p. 64.

[89]*Id.*, 7 (Table 1).

[90]California Department of Corrections, Executions in California 1943 through 1963 (Appendix II) (1965); California Bureau of Criminal Statistics, Crime and Delinquency in California—1969 (Table II-1) 52 (1970).

death penalty and therefore the possibility arising
a substantial portion of the population of a State
having the death penalty might not be fully aw
of the latter fact.

Last, and perhaps most significant, is the fact
many murders are not deterrable since they repres
irrational crimes, crimes of passion in which a fam
or friends are the victims, and crimes resulting fr
provocation. These murders, which almost never
ceive the death penalty in California,[91] and wh
would probably be undeterrable even if drawing a
quartering were still the punishment,[92] are promis
ously lumped by the statisticians with murders whi
respondent will demonstrate, are frequently deterrab
A study of murder rates and their relationship to
death penalty would be valid only if it were to lim
itself to deterrable homicides involving a course of cri
inal conduct understandingly embarked upon, such
armed robbery, collection of insurance on the victim
life, or kidnaping for ransom.

Some reference has already been made, in refuti
the selective quotation of evidence by one of the *ami*
curiae from a collateral proceeding,[93] to the informe
belief of many who have had first-hand contacts wi

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[91]*See* n. 107, *infra,* and Appendix to Respondent's Brief.

[92]The same point might be made with reference to t
"probably apocryphal" story that when pickpocketing was
capital offense in England, pickpockets plied their trade at t
foot of the gallows as a fellow pickpocket was hanged. &
Bedau, The Death Penalty in America 20 (rev. ed. 1967
Faced with the choice between immediate starvation and intole
able poverty on the one hand, and the possibility of a hangi
sometime in the future on the other, such persons were probab
undeterrable.

[93]*See* pp. 60-61, *infra.*

criminals that the latter in particular situations frequently refrain from killing because of their fear of the death penalty.[94] Many such graphic illustrations are set forth as follows, in the California Supreme Court case of *People v. Love*, 56 Cal. 2d 720 [336 P.2d 33] (1961) (McComb, J., dissenting):

"(b) In the early history of the western states of the United States of America, including California, the death penalty was imposed by the early settlers to stop the rustling of cattle. It is a matter of common knowledge that in the early days of this state the apprehension and hanging of cattle rustlers reduced, and almost stopped, the theft of cattle.

"(c) In the early history of San Francisco, law enforcement broke down and chaotic conditions prevailed. A group of citizens, known as the Vigilantes, undertook to restore order. To do this, they apprehended criminals and after trial promptly executed the guilty parties. Order was restored, and the civil authorities assumed control again. Clearly fear of the death penalty was the basic reason for the restoration of order.

"(d) Any prosecuting attorney or criminal defense attorney or any trial judge who has sat for a substantial period in a department of the superior court devoted to the trial of felony cases knows

[94] "There is no reliable method for determining who has contemplated committing a capital crime but refrained due to the fear of the death penalty as distinguished from other forms of criminal punishment. . . . It is probably impossible to subject deterrence to scientific study in any direct way. . . . The facts cannot be ascertained so that they can be subjected to scientific analysis and interpretation." Florida Spec'l Comm'n for the Study of Abolition of Death Penalty in Capital Cases, Report 13-14 (1965).

that many felons are careful to refrain from arming themselves with a deadly weapon because they do not want to take the chance of killing anyone and suffering death as a penalty.

"A few recent examples of the accuracy of this view are to be found in the following cases involving persons arrested by officers of the Los Angeles Police Department. . . ."[95] *Id.*, 734-35 [366 P.2d at 40-41] (McComb, J., dissenting).

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[95]"(i) Margaret Elizabeth Daly, of San Pedro, was arrested August 28, 1961, for assaulting Pete Gibbons with a knife. She stated to investigating officers: 'Yeh, I cut him and I should have done a better job. *I would have killed him but I didn't want to go to the gas chamber.*'

"(ii) Robert D. Thomas, alias Robert Hall, an ex-convict from Kentucky; Melvin Eugene Young, alias Gene Wilson, a petty criminal from Iowa and Illinois; and Shirley R. Coffee, alias Elizabeth Salquist, of California, were arrested April 25, 1961, for robbery. They had used toy pistols to force their victims into rear rooms, where the victims were bound. When questioned by the investigating officers as to the reason for using toy guns instead of genuine guns, all three agreed that real guns were too dangerous, *as if someone were killed in the commission of the robberies, they could all receive the death penalty.*

"(iii) Louis Joseph Turck, alias Luigi Furchiano, alias Joseph Farino, alias Glenn Hooper, alias Joe Moreno, an ex-convict with a felony record dating from 1941, was arrested May 20, 1961, for robbery. He had used guns in prior robberies in other states but simulated a gun in the robbery here. He told investigating officers that he was aware of the California death penalty although he had been in this state for only one month, and said, when asked why he had only simulated a gun, *'I knew that if I used a real gun and that if I shot someone in a robbery, I might get the death penalty and go to the gas chamber.'*

"(iv) Ramon Jesse Velarde was arrested September 26, 1960, while attempting to rob a supermarket. At that time, armed with a loaded .38 caliber revolver, he was holding several employees of the market as hostages. He subsequently escaped from jail and was apprehended at the Mexican border. While being returned to Los Angeles for prosecution, he made the following statement to the transporting officers: 'I think I might have escaped at the market if I had shot one or more of them. *I probably would have done it if it wasn't for the gas chamber.* I'll

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Similar views have been voiced by another Justice of the California Supreme Court on the basis of his personal experience:

"That the ever present potentiality in California of the death penalty, for murder in the commission of armed robbery, each year saves the lives of scores, if not hundreds of victims of such crimes, cannot I think, reasonably be doubted by any judge who has had substantial experience

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only do 7 or 10 years for this. I don't want to die no matter what happens, you want to live another day.'

"(v) Orelius Mathew Stewart, an ex-convict, with a long felony record, was arrested March 3, 1960, for attempted bank robbery. He was subsequently convicted and sentenced to the state prison. While discussing the matter with his probation officer, he stated: 'The officer who arrested me was by himself, and if I had wanted, I could have blasted him. *I thought about it at the time, but I changed my mind when I thought of the gas chamber.*'

"(vi) Paul Anthony Brusseau, with a criminal record in six other states, was arrested February 6, 1960, for robbery. He readily admitted five holdups of candy stores in Los Angeles. In this series of robberies he had only simulated a gun. When questioned by investigators as to the reason for his simulating a gun rather than using a real one, he replied that *he did not want to get the gas chamber.*

"(vii) Salvador A. Estrada, a 19-year-old youth with a four-year criminal record, was arrested February 2, 1960, just after he had stolen an automobile from a parking lot by wiring around the ignition switch. As he was being booked at the station, he stated to the arresting officers: 'I want to ask you one question, do you think they will repeal the capital punishment law. *If they do, we can kill all you cops and judges without worrying about it.*'

"(viii) Jack Colevris, a habitual criminal with a record dating back to 1945, committed an armed robbery at a supermarket on April 25, 1960, about a week after escaping from San Quentin Prison. Shortly thereafter he was stopped by a motorcycle officer. Colevris, who had twice been sentenced to the state prison for armed robbery, knew that if brought to trial, he would again be sent to prison for a long term. The loaded revolver was on the seat of the automobile beside him, and he could easily have shot and killed the arresting officer. By his own statements to the interrogating officers, however, *he was deterred from this*

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at the trial court level with the handling of such persons. I know that during my own trial court experience, which although not extensive in criminal law, included some four to five years (1930-1934) in a department of the superior court exclusively engaged in handling felony cases, I repeatedly heard from the lips of robbers—some amateurs (no prior convictions), some professionals (with priors)—substantially the same

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action because he preferred a possible life sentence to death in the gas chamber.

"(ix) Edward Joseph Lapienski, who had a criminal record dating back to 1948, was arrested in December 1959 for a holdup committed with a toy automatic type pistol. When questioned by investigators as to why he had threatened his victim with death and had not provided himself with the means of carrying out the threat, he stated, *'I know that if I had a real gun and killed someone, I would get the gas chamber.'*

"(x) George Hewlitt Dixon, an ex-convict with a long felony record in the East, was arrested for robbery and kidnaping committed on November 27, 1959. Using a screw-driver in his jacket pocket to simulate a gun, he had held up and kidnaped the attendant of a service station, later releasing him unharmed. When questioned about his using a screwdriver to simulate a gun, this man, a hardened criminal with many felony arrests and at least two known escapes from custody, indicated his fear and respect for the California death penalty and stated, *'I did not want to get the gas.'*

"(xi) Eugene Freeland Fitzgerald, alias Edward Finley, an ex-convict with a felony record dating back to 1951, was arrested February 2, 1960, for the robbery of a chain of candy stores. He used a toy gun in committing the robberies, and when questioned by the investigating officers as to his reasons for doing so, he stated: *If I had a real gun and killed someone, I would get the gas. I would rather have it this way.'*

"(xii) Quentin Lawson, an ex-convict on parole, was arrested January 24, 1959, for committing two robberies, in which he had simulated a gun in his coat pocket. When questioned on his reason for simulating a gun and not using a real one, he replied that *he did not want to kill someone and get the death penalty.*

"(xiii) Theodore Roosevelt Cornell, with many aliases, an ex-convict from Michigan with a criminal record of 26 years, was arrested December 31, 1958, while attempting to hold up the box office of a theater. He had simulated a gun in his coat

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story: 'I used a toy gun [or a simulated gun or a gun in which the firing pin or hammer had been extracted or damaged] because I didn't want my neck stretched.' (The penalty, at the time referred to, was hanging; death by lethal gas was substituted in 1941.)" (Footnotes omitted.)

People v. Love, 56 Cal. 2d 720, 744 [336 P.2d 33, 46-47] (1961) (Schauer, J., dissenting).[86]

Numerous other incidents reflecting the deterrent effect of the death penalty are related in the Royal Commission on Capital Punishment 1949-1953 Report, at 335-39 (1953), including instances in which a murderer deliberately chose a jurisdiction not having the death penalty as the site of his crime in order to escape capital punishment. *Id.*, 337-38.

Another source notes that shortly before California's last execution, a liquor store owner was attacked by a

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pocket, and when asked by investigating officers why an ex-convict with everything to lose would not use a real gun, he replied, *'If I used a real gun and shot someone, I could lose my life.'*

"(xiv) Robert Ellis Blood, Daniel B. Gridley, and Richard R. Hurst were arrested December 3, 1958, for attempted robbery. They were equipped with a roll of cord and a toy pistol. When questioned, all of them stated that they used the toy pistol because *they did not want to kill anyone, as they were aware that the penalty for killing a person in a robbery was death in the gas chamber.*" (Emphasis in the original.) *Id.*, 735-37 [336 P.2d at 41-42] (McComb, J. dissenting). *See also* Coakley, *Capital Punishment*, 1 Amer. Crim. L. Q. 27, 31-32 (1963); American Bar Association, Section of Criminal Law Proceedings —1959, 15-16.

[86]Justice Schauer noted, "I use robbery as the example. . . . The point of my discussion, however, is equally applicable to the deterrent effect of the death penalty against harming kidnap victims and against murder committed in the perpetration or attempt to perpetrate arson, rape, burglary, mayhem or lascivious acts upon a child. . . ." *Id.*, 744(n.1) [336 P.2d at 46.]

knife-wielding assailant who told him, " 'I'm going to kill you' " but was deterred when his intended victim replied, " 'You may kill me, but you will go to the gas chamber.' "[97]

A recent study conducted by the Los Angeles Police Department confirms the continued validity of the foregoing conclusions, which are drawn from innumerable incidents experienced by those whose contact with criminals is real and direct rather than merely academic.[98]

This study, embodied in a 62-page report, was conducted between December 21, 1970, and February 4, 1971, and involved the interviewing of 316 arrestees. Los Angeles Police Department, Detective Bureau, Administrative Analysis Section, A Study by the Los Angeles Police Department on Capital Punishment 3 (February, 1971). Unarmed suspects were asked why they did not arm themselves, and armed suspects who did not use their weapons were asked why they did not. *Id.*, 61. Of the 316 persons interviewed, 217 denied their crime or refused a statement, primarily out of a desire not to jeopardize their case. *Id.*, 11. The positive statements made by the remaining 99 are classified as follows.

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[97]District Attorneys' and County Counsels' Association of California, Official Position on Capital Punishment 1 (September 2, 1971), quoting the Sacramento Bee, May 5, 1967.

[98]This is not to imply that all those whose experience with the criminal world is purely academic are dubious of the deterrent effect of the death penalty. *See, e.g.*, Van Den Haag, *On Deterrence and the Death Penalty*, 60 J. Crim. L.C. & P.S. 141 (June, 1969).

TABLE D

Los Angeles Police Department Study of the Deterrent Effect of the Death Penalty, February, 1971[99]

1. *Deterred* by fear of death penalty from carrying weapon or operative weapon	50 (50.5%)
2. *Unaffected* by death penalty because it was no longer being enforced	7 (7.07%)
3. *Undeterred* by death penalty, would kill whether it was enforced or not	10 (10.1%)
4. *Unaffected* by death penalty because they would not carry weapon in any event, primarily out of fear of being injured themselves or of injuring someone else	32 (32.3%)

The conclusions drawn from the study are as follows:

> "I. The adoption of an effectively enforced death penalty system is a deterrent in the prevention of homicides. II. Though the death penalty has not been removed from the statutes in California, many suspects believe in reality that no death penalty exists as it is not being enforced. III. Some suspects, while realizing that the California death penalty exists in name only, disclose that the certainty of an executed death penalty sentence would deter them from being armed while committing crimes." *Id.*, 2.

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[99]Los Angeles Police Department, Detective Bureau, Administrative Analysis Section, A Study by the Los Angeles Police Department on Capital Punishment 11 (February, 1971).

The report also notes, "If this study contained only one and not the 50 documented cases supporting the fact that the death penalty is a deterrent, there should be no question of its retention and enforcement. In 1970 in the City of Los Angeles, 394 innocent people were victims of an unlawful execution without the right of due process of law." *Id.*, 1.

On the basis of objective criteria,[100] the report compiled and selected 25 case histories from the 99 individuals who made positive statements. Of the 25 arrestees, 16 were under arrest for robbery, 4 for burglary, 3 for felonious assault, and 2 for rape; and 10 were armed when arrested while 15 were not.[101] *Id.*, 8. The time elapsed between arrest and interview ranged from 1 to 5 days and averaged 2 days.[102] *Id.*, 9.

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[100]Inclusion of cases from different areas of the city to include various types of crimes, juveniles and adults, suspects having as varied ethnic, religious, and economic backgrounds as possible; selection of cases so that no investigator participated in more than one case history; selection of cases from various time periods within the survey; inclusion of as many different arrestee views as possible either showing or not showing behavior deterred by the death penalty. Approximately 97% of the 1,022 officers of the detective bureau were asked to participate in the study. *Id.*, 4-5.

[101]Of the 25, 23 were male adults and 2 were male juveniles; 10 were Caucasian, 13 were Negro, and 2 were Latin; age ranged from 16 years to 40 years, averaging 24.8 years; number of felony arrests per suspect ranged from 1 to 21 and of misdemeanor arrests from 0 to 16, averaging 7.7 felony arrests and 3.9 misdemeanor arrests; and range of time lived in California was from 1 year to 40 years, averaging 14.4 years. *Id.*, 8-9.

[102]The Christmas and New Year holidays occurred during the period covered by the study and caused the average elapsed time between arrest and interview to increase to twice its normal figure. *Id.*, 10.

The statements made by these 25 arrestees are indicated below.[108]

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[108](1) (unarmed robber) "Since in reality there is no death penalty in California, I would kill to obtain what I want." (2) (armed robber) "I used a pellet gun because I didn't want to kill anyone and be put to death in the gas chamber." (3) (unarmed burglar) "I don't carry a gun. I don't want to be shot at by police and am afraid of the death penalty." (4) (armed robber) "I used an unloaded gun in the robbery of a market so I would not hurt anyone and because I am afraid of death penalty." (5) (armed robber) "The gun was unloaded because I didn't want to hurt anyone. I know the punishment would be greater if I shot anyone during a robbery." (6) (armed robber) "I would be afraid to use a gun because of possible death penalty." (7) (armed attempted murderer) "I would have shot it out if necessary, the death penalty is no deterrent." (8) (armed robber) "I used a blank revolver because I'm an ex-con." (9) (unarmed robber) "I would not use a gun, I am afraid of the consequences of the death penalty." (10) (unarmed burglar) "I never owned a gun because I'm afraid of the death penalty." (11) (unarmed burglar) "If I was armed I would not have used the weapon, I am afraid of the gas chamber." (12) (unarmed robber) "I didn't use a gun because I was afraid of being shot." (13) (armed suspect charged with assault with a deadly weapon) "I would kill if I had the chance, I'm not afraid of any courts. They are easy." (14) (unarmed attempted robber) "I am waiting for the death penalty to be removed, then everything is free." (15) (unarmed forcible rapist) "I don't carry a gun because I'm afraid of getting the death penalty." (16) (unarmed burglar) "Because of the death penalty, I would never arm myself." (17) (unarmed forcible rapist) "I have gotten into too much trouble before when I had a gun." (18) (armed suspect charged with assault with intent to commit murder) "Even if a death occurred as a result of a shooting, I am not afraid because no one believes in the death penalty anymore." (19) (unarmed robber) "I am afraid of the death penalty. I wasn't armed." (20) (unarmed robber) "I used a toy gun, I didn't want to hurt anyone." (21) (unarmed robber) "I don't carry a gun, I might shoot someone accidentally, I'm afraid of the death penalty." (22) (unarmed burglar) "I'm an ex-con, I would be an idiot to carry a gun. Punishment would be too great." (23) (armed robber) "I didn't want to hurt anyone, I had an empty gun." (24) (unarmed robber) "I would use weapon if I got into a bind. It doesn't make any difference, no one goes to the gas chamber." (25) (armed robber) "I would use gun if necessary, but I fear the death penalty." *Id.*, 12-40.

Respondent submits that such data cannot accurately be dismissed as "anecdotal impressions of law enforcement" (Pet. Br. 1h, 8h) and that they are instead persuasive proof that the existence of capital punishment, even though unenforced today, acts to deter a substantial number of criminals from making the premeditated decision to arm themselves with operable weapons or from using such weapons to kill their victims. Undoubtedly numerous citizens are alive today only because of the existence of the death penalty, and other victims probably would not have been executed had some criminals not held the accurate belief that the death penalty is not being enforced today.

These circumstances lead one to what is perhaps the most compelling justification for the death penalty. That is that the armed robber or armed burglar, commonly faced with a maximum term of life imprisonment[104] if apprehended, might well consider himself foolish not to kill his victims or other witnesses if by doing so he were to risk only the same penalty, life imprisonment, for murder, while increasing multifold his chances of avoiding apprehension. The armed robber of a one-man liquor store operation would not let our views of the dignity of human life cause him to hestitate for a moment at killing the lonely figure behind the counter at a late hour when no other persons are around to witness such an execution. The same applies to the willingness of the armed robber to kill a police officer in order to avoid apprehension and conviction, when without the death penalty the crim-

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[104]*See, e.g.*, Cal. Pen. Code §§ 213, 461, 671.

inal will risk no added punishment if he does away with his intended captor.[108]

This justification for the death penalty was judicially recognized in *People v. Love*, 56 Cal. 2d 720, 746 [366 P.2d 33, 48] (1961) (Schauer, J., dissenting):

> "[T]he robber can do one thing that will vastly decrease the risk of identification and conviction: he can eliminate the known witnesses—the victims he robs. . . . It cannot be validly disputed that the choice as to [what] he carries—a gun or what looks like a gun—is in case after case controlled solely by his respect for the death penalty. If the punishment he risks for robbery is to be imprisonment—and only imprisonment, even if he eliminates the only witness—it would seem inevitable that the incentive to kill would be greatly increased. The greater chance of escaping any punishment would, in the minds of some at least, outweigh the slighter risk of having the term increased. Many a robber who would take the risk of a longer term would absolutely shun any plan which substituted death for imprisonment."

Justice Schauer concluded that abolition of the death penalty "would be tragically undesirable to the families of the innocent victims who would die violently as a result." *Id.*, 747.

The California Legislature's defeat of bills to abolish capital punishment has been predicated in part upon

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[108] *See* 4 Blackstone, Commentaries 18 (Tucker ed. 1803): "Thus in France the punishment of robbery, either with or without murder, is the same: hence it is, that though perhaps they are therefore subject to fewer robberies, yet they never rob but they also murder. In China, murderers are cut to pieces, and robbers not: hence in that country they never murder on the highway, though they often rob."

precisely such evidence concerning the deterrent effect of the death penalty, including instances of felons deliberately choosing jurisdictions not having the death penalty in which to commit their crimes. *See* California Senate, *Hearing Report and Testimony on Senate Bill No. 1, 1960 Second Extraordinary Session, Which Proposed to Abolish the Death Penalty in California and to Substitute Life Imprisonment Without Possibility of Parole* 133-35, 149-54, 156, 161 (March 9, 1960), referred to in *People v. Love, supra* at 755-56 [366 P.2d at 813-14] (Schauer, J., and McComb, J., dissenting from denial of petition for rehearing).[108] The latter opinion quotes a prominent defense attorney concurring in the conclusion that such evidence is persuasive and observing, "'"Naturally, there can be no statistics produced to demonstrate how many murders were *not committed because the would-be perpetrator feared the death penalty*."'" (Emphasis in the original.) *Id.*, 756 [336 P.2d at 814]. *See also Robinson v. United States*, 324 U.S. 282, 284.

Respondent recognizes that the existence of capital punishment does not operate as a deterrent to *all* criminals. Similarly the British Royal Commission concluded:

> "Prima facie the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment, and there is some evidence (though no convincing statistical evidence) that this is in fact so. But this effect does not operate universally or uniformly, and there are many offenders on whom it is limited and may often be negligible."
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> Royal Commission on Capital Punishment 1949-1953 Report, 24; *see also supra* at 274.

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[108] *See also* Los Angeles Times, Part I, pp. 1, 24 (June 23, 1971).

"But it would be absurd to claim because it did not deter *all* it did not deter *any*." (Emphasis in the original.) *People v. Love, supra* at 745 [366 P.2d at 47] (Schauer, J., dissenting). The death penalty clearly does operate as a deterrent with respect to a sizable segment of the criminal population, as previously demonstrated. And significantly it is this segment, the majority of whose crimes are committed for pecuniary gain, who commit the types of crimes that so often end up incurring the death penalty when life is taken in connection therewith. As is also indicated in the Appendix to this brief, the crimes of passion, which are rarely deterrable, incur the death penalty only under the most exceptional circumstances and constitute only a minute portion of the death sentences imposed in California.[107]

"[A]ll those who violate penal laws of any kind are by definition undeterred." *Powell v. Texas,* 392 U.S. 514, 531 (plurality opinion of Marshall, J.). However, we can never know the number of persons who

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[107]For example, respondent is informed by the staff of the California State Prison at San Quentin that the crimes of only four of the 98 men currently housed on that institution's Death Row involve the killing of the defendant's wife. Each of these four cases indicates exceptional circumstances and only the last listed can arguably be said to involve an element of passion: (1) Perveler: a former police officer who, with his girlfriend, calculatingly killed his wife and the girlfriend's husband; (2) Archerd: a male nurse who killed six persons, some of them former wives, with insulin injections for the motive of monetary gain; (3) Murphy: who hired another person to accost the defendant's wife on a public road and murder her; (4) Crosier: who killed his common-law wife and was also convicted on a charge of assault with intent to commit murder upon another victim. None of the victims of the four women currently under sentence of death in California were husbands or lovers of the defendants.

More than half of the persons executed since 1943 killed their victims during the course of a robbery or a sexual assault

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are deterred by the death penalty although, as respondent has demonstrated, they are many.

That the death penalty does not deter all does not render it an ineffective, much less an unconstitutional, punishment. As one authority metaphorically illustrates the point,

> "A judge once said, 'The death penalty is a warning, just like a lighthouse throwing its beams out to sea. We hear about shipwrecks, but we do not hear about the ships the lighthouse guides safely on their way. We do not have proof of the number of ships it saves, but we do not tear the lighthouse down."
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> Hoover, *Statements in Favor of the Death Penalty*, in Bedau, The Death Penalty in America 130, 131 (rev. ed. 1967).

In short, there is substantial and highly persuasive evidence, founded upon hard facts and human experience, of the deterrent effect of the death penalty. In concluding that the death penalty has no deterrent effect, the theoretical and statistical approach relied on

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on a female, and another quarter of the number executed killed their victims during the course of a burglary, a quarrel with a crime partner, an attempt at escape, a prison fight, or while resisting arrest. California Department of Corrections, Executions in California 1943 Through 1963 (Table 30) (1965).

See also Report of New Jersey Commission to Study Capital Punishment 8-9 (October, 1964): "The Commission is convinced that capital punishment does deter some potential murderers from committing capital crimes. More importantly, it is believed that the deterrence is most signficant in the area of felony murder and in the area of a truly premeditated crime. . . .

"No punishment would be a deterrent for a crime of passion, or a crime committed by one who is insane. Those are not the persons who generally receive the death penalty. An examination of the crimes by the 14 persons presently awaiting execution in New Jersey . . . makes it abundantly clear that this is so."

by petitioner "goes much too far on the basis of too little knowledge." *Powell v. Texas*, 392 U.S. 514, 521 (plurality opinion of Marshall, J.). As Justice Marshall observed with general reference to the deterrent effect of criminal sanctions,

> "The long-standing and still raging debate over the validity of the deterrence justification for penal sanctions has not reached any sufficiently clear conclusions to permit it to be said that such sanctions are ineffective in any particular context or for any particular group of people who are able to appreciate the consequences of their acts. . . ." *Id.*, 531.

Respondent submits that the foregoing statement has equal validity when applied specifically to the deterrent effect of the death penalty.

Deterrence is not the only function of punishment served better in many instances by the existence of the death penalty than by a maximum available punishment of life imprisonment. Despite petitioner's insistence to the contrary, life imprisonment often provides a woefully inadequate method of protecting society through incapacitation or isolation of the prisoner.

Life imprisonment in California means the prisoner is eligible for parole after serving seven years of his term.[108] Cal. Pen. Code § 3046. The myth that paroled murderers do not kill again evaporates upon a perusal of the case reports. *See, e.g., People v. Peete*, 28 Cal. 2d 306, 308-09 [169 P.2d 924, 926] (1946),

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[108]Life imprisonment without possibility of parole, an available punishment in California only for the offense of aggravated kidnaping (Cal. Pen. Code § 209), may in effect permit parole of the prisoner, since the Governor may commute such a term to one of life with possibility of parole. Cal. Const. art. V, § 8.

cert. denied, 329 U.S. 790; *People v. Purvis*, 52 Cal. 2d 871, 875 [346 P.2d 22, 24] (1959); *People v. Gilbert*, 63 Cal. 2d 690, 702 [408 P.2d 365, 372] (1965), *vac'd* 388 U.S. 263. *See also People v. Robles*, 2 Cal. 3d 205, 213 [466 P.2d 710, 715] (1970); *People v. St. Martin*, 1 Cal. 3d 524, 529 [463 P.2d 390, 392] (1970); *People v. Vaughn*, 71 Cal. 2d 406, 412 [455 P.2d 122, 124] (1969); *In re Cathey*, 55 Cal. 2d 679, 685 [361 P.2d 426, 428] (1961); *People v. Jensen*, 43 Cal. 2d 572, 578 [275 P.2d 25, 30] (1954). Testimony before a California legislative committee has cited the cases of numerous murderers who killed again after being paroled, of prisoners serving life terms who killed in prison, and at least one instance of a prisoner assaulting a correctional officer after the Governor had commuted the prisoner's sentence from death to life.[109] Two prisoners whose death sentences were commuted to life were paroled only to endanger the lives of others and have their parole revoked.[110] And eleven of the persons executed in California between 1944 and 1957 had committed one or more murders prior to the crime for which they were executed, a majority of these defendants having served "life" sentences for these prior murders.[111]

There is always the substantial risk of escape, no matter what precautions are taken to guard the con-

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[109]California Senate, *Hearing Report and Testimony on Senate Bill No. 1, 1960 Second Extraordinary Session, Which Proposed to Abolish the Death Penalty in California and to Substitute Life Imprisonment Without Possibility of Parole* 134-37 (March 9, 1960); Los Angeles Times, Part I, p. 1 (December 13, 1958).

[110]California Department of Corrections, Executions in California 1943 Through 1963 (Appendix V) (1965).

[111]*Id.* (Appendix IV).

victed murderer. For example, the defendant in *People v. Hall*, 199 Cal. 451, 458-59 [249 P. 859, 861] (1926), subsequent to his conviction of first degree murder and sentence to life imprisonment, escaped from San Quentin and thereafter committed another first degree murder. *See also People v. Gilbert, supra; People v. Jensen, supra.* The consequences of an unsuccessful attempt at escape can be just as fatal, as evidenced by the recent escape attempt, at the California State Prison at San Quentin, of a life-term prisoner awaiting trial on a charge of murdering a correctional officer. His effort caused the death of three more correctional officers and two inmates at the hands of himself and other inmates, as well as his own death.[112]

When a prisoner under life sentence is brought to court for further proceedings, the inadequacy of such punishment as protection for society may again become very apparent, as was the case recently when three San Quentin prisoners serving life sentences unsuccessfully attempted to escape from a county courthouse and in the process shot to death the presiding judge and wounded the prosecuting attorney and a juror.[113] Similarly the pendency of new court proceedings against one defendant, already under sentences of death arising from another case, recently provided the occasion for his cohorts to steal 140 firearms intended to be used in an armed assault on the courthouse in an attempt to liberate him.[114]

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[112]Los Angeles Times, Part I, pp. 1, 24 (August 22, 1971).

[113]*Id.*, Part I, p. 1 (August 8, 1970).

[114]*Id.*, Part I, p. 3 (August 25, 1971).

Despite the maximum security on death row, escape attempts by prisoners under sentence of death have also been attempted at San Quentin. In 1967 four prisoners under sentence of death succeeded in sawing through the bars of their cells before being apprehended, and five years earlier six such prisoners did the same, bludgeoned two guards, and seized their guns, holding the guards hostage for three hours in an attempt to escape.[115]

Indeed the phenomenal increase in the number of fatal assaults on correctional officers in California prisons in the last few years,[116] as reflected in the figures below, is indicative of the fact that punishment of prisoners by life imprisonment does not fully protect either our custodial personnel or those inmates who are of necessity confined with violent offenders. The fatalites may be increasing because " 'the inmate of today is more hostile, is immature, prone to act out, and less motivated,' "[117] and there is reason to believe that absent the death penalty there would be a far greater number of prison homicides, particularly by persons serving life sentences.

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[115]Los Angeles Times, Part I, p. 3 (January 31, 1967).

[116]Note also the recent death of 10 guards caused by inmates in a single day at a New York prison. Los Angeles Times, Part I, p. 1 (September 14, 1971); *id.*, Part I, p. 1 (September 15, 1971).

[117]California Assembly, Report of the Select Committee on the Administration of Justice, Parole Board Reform in California 13 (1970). The foregoing legislative committee disputes this conclusion of the California Department of Corrections. *Ibid.*

TABLE E

Homicides in California Prisons, 1965-1971, Committed by Adult Felons[118]

	Correctional Officers Killed by Inmates	Inmates Killed by Other Inmates
1971 (Jan. 1 to Sept. 1)	6	12
1970	2	8
1969	0	15
1968	0	15
1967	0	9
1966	0	3

The chronology which follows provides one of the more graphic illustrations of the need for an enforced death penalty in coping with custodial homicides committed by convicted murderers. The California Supreme Court reversed the judgment of conviction which had imposed two death sentences on a defendant, on a rule of law that was totally novel to the California courts, to wit, that it would henceforth (but retroactively) be deemed improper for a prosecutor or a trial judge to inform the jury of the fact that a defendant under life sentence is eligible for parole after serving seven years imprisonment. (Cal. Pen. Code § 3046.) On retrial of the penalty issue, the jury imposed a life sentence on the murder charges. While in his cell awaiting formal sentencing, the defendant with a mattress cover garrotted a fellow prisoner on the other side of the cell bars, because the prisoner owed him some cigarettes. For the latter offense the defendant was tried by jury and sentenced to death, only to have the Cali-

[118]These figures were obtained from the files of the California Department of Corrections.

fornia Supreme Court, in two separate opinions filed the same day, reverse both cases.[119]

Respondent submits that the unique deterrent and incapacitative effects of the death penalty are apparent from the foregoing discussion. However, the constitutionality of the death penalty, unlike a legislative determination of its desirability, cannot turn upon whether the members of this Court or of some other body find the evidence supportive of the death penalty more persuasive than the evidence supportive of the abolition of that form of punishment. The issue raised by petitioner at most requires this Court to determine whether, as petitioner in essence contends, there is *no substantial evidence* upon which the Congress or the Legislatures of 41 States could reasonably conclude that the death penalty for certain serious offenses serves a legitimate social purpose.

Having shown that there is indeed very substantial evidence supportive of the legislative view that capital punishment is necessary for the protection of society[120] under the conditions presently existing, respondent believes that it has met its burden vis-a-vis this facet of petitioner's constitutional attack on the death penalty.

It is a settled doctrine of constitutional law that the burden of proof is on one who challenges the constitutionality of a statute, and that in the absence of a

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[119]*People v. Morse*, 60 Cal. 2d 631 [388 P.2d 33] (1964); *In re Morse*, 70 Cal. 2d 702 [452 P.2d 601] (1969); *People v. Morse*, 70 Cal. 2d 711 [452 P.2d 607] (1969), *cert. denied*, 397 U.S. 944. Other factually similar cases have occurred in California.

[120]In the sense in which both are expressions of society's need to protect the lives of its citizens, the state's right to execute its most dangerous criminals is analogous to its right to kill the enemy on the battlefield and to the right of the individual to kill in defense of himself or others.

clear showing of unconstitutionality a state statute will be presumed valid. *McGowan v. Maryland*, 366 U.S. 420, 425-26. Moreover, strong policy considerations, involving the balancing of the respective interests which petitioner and respondent seek to protect, dictate that the burden of proof rest upon petitioner.

Compare the consequences of an incorrect decision upholding the death penalty with the consequences that would flow from an incorrect prohibition against the States' employing that form of punishment. It seems so much more important to spare the lives of a substantial number of innocent citizens and law enforcement officers who would be murdered but for the death penalty, than to spare the lives of some of our most vicious murderers. Undoubtedly the consequences of an incorrect decision to *prohibit* the death penalty would be so much more undesirable in both social and moral terms,[121] that this Court should certainly hesitate to overrule hundreds of years of law and human experience upon the meager and speculative showing made by petitioner.

As was stated by one former Justice of the California Supreme Court having substantial trial experience,[122]

> "Because of what my own eyes have seen and my ears have heard I cannot doubt the efficacy of the death penalty as a savior of the lives of victims of robbers, kidnapers, burglars, and criminals of similar dispositions. But if there were

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[121] *See* Van Den Haag, *Deterrence and the Death Penalty*, 60 J. Crim. L.C. & P.S. 141, 146-47 (1969).

[122] *People v. Love*, 56 Cal. 2d 720, 744 [366 P.2d 33, 47] (1961) (Schauer, J., dissenting).

doubt in my mind I should resolve it in favor of protecting the innocent victims of the future rather than sparing the guilty killers of the past."[123]

Moreover, in the event this Court were to adopt petitioner's expansive and fluid interpretation of the Eighth Amendment,

> ". . . it is difficult to see any limiting principle that would serve to prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country."
> *Powell v. Texas*, 392 U.S. 514, 533 (plurality opinion of Marshall, J.).

The adoption of petitioner's approach might well saddle the States with the burden of having to justify various forms of non-capital punishment by establishing that life imprisonment without possibility of parole more effectively serves the aims of punishment than life with possibility of parole, that life is more effective than a fixed or variable term of years, imprisonment more effective than county jail, county jail more effective than probation, and probation more effective than a fine.

Respondent submits that in view of petitioner's inability to make a clear showing that the death penalty serves no legitimate function, the federal Constitution leaves the People of the State of California free to determine through their elected representatives that the protection of society under present conditions requires death as a form of punishment for certain serious offenses.

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[123] *Id.*, 747 [366 P.2d at 48].

D. The Death Penalty Is Not Arbitrarily or Discriminatorily Imposed Upon Racial Minorities, the Poor, or the Uneducated in California; Prisoners Under Sentence of Death Constitute a Representative Cross-Section of California's Criminal Population

Petitioner's challenge to the constitutionality of the death penalty rests in part upon his assertion that such punishment inevitably falls with an uneven hand upon certain less advantaged segments of our society.

Petitioner, *amici*, and the fellow abolitionists whose writings they cite, echo the familiar refrain that universally the death penalty is arbitrarily and discriminatorily imposed upon members of racial minorities, the poor, the uneducated, the mentally deficient,[124] and the "friendless." (Pet. Br. 51-54.)

The foregoing has been so frequently mouthed as gospel truth, albeit without much of an attempt to support it factually, that a challenge to such dogma may seem almost heretical. However, respondent has found that illuminating data drawn from the operation of California's system of criminal justice effectively puts the lie to these blind assertions.

The files of the 102 persons currently housed in the California prison system under sentence of death (3 of whom have penalty retrials pending), as well as the files of the 11 persons presently housed in county jail facilities awaiting penalty retrials, have been examined by counsel for respondent. Four of these persons are women, all of whom are Caucasian and in the state

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[124]Numerous safeguards protect the mentally deficient defendant at all stages in a capital case. *See, e.g.*, Cal. Pen. Code §§ 190.1, 1026-27, 1368-70, 3700-06, 4800-06.

prison system.[125] The 102 state prisoners are comprised of Caucasians (including Mexican-Americans and Puerto Ricans), Negroes, one Filipino, one American Indian, and one Arab. The 11 county prisoners include, in addition to Caucasians and Negroes, one Eskimo.

A comparison of the percentage of Negroes on death row in California with the percentage of Negroes indicated in other pertinent areas of the criminal process[126] yields the following results indicative of the absence of racial bias in the imposition of the death penalty in California.

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[125] *See* California State Prison at San Quentin, Execution Data (September 1, 1971).

[126] The comparison is limited to Negroes since they constitute the largest minority group and the only one for which complete penal statistics are readily available.

TABLE F

Race and the Imposition of the Death Penalty in California[127]

	Caucasian	Negro	Other
Prisoners Executed, All Offenses, 1930-1970	75.7%	18.2%	6.1%
Prisoners Executed, Murder, 1930-1970	75.0%	18.6%	6.4%
Under Sentence of Death, or Awaiting New Penalty Trial, All Offenses, September 1, 1971	65.5%	25.7%	8.8%
Received in Prison, 1st Degree Murder, 1970	60.7%	36.7%	2.6%
Received in Prison, 2nd Degree Murder, 1970	55.8%	39.9%	4.3%
Received in Prison, Non-Vehicular Manslaughter, 1970	55.5%	43.8%	0.7%
Charged in Superior Court with Homicide, 1969	59.2%	38.1%	2.7%
Received in Prison, All Offenses, 1970	69.0%	29.3%	1.7%

[127]Compiled from data (to be published) in California Department of Corrections, California Prisoners—1970 (Table 18A) (197-); California Bureau of Criminal Statistics, Crime and Delinquency in California—1969 (Table VI-9) 117 (1970); U.S. Bureau of Prisons, National Prisoner Statistics Bulletin: Capital Punishment 1930-1968 (August, 1969) at 11 (Table 3).

Similarly, a recent in-depth study of the death penalty in California concludes, contrary to the assertion of one critic,[128] that race plays no part in a jury's determination of punishment in a capital case. Special Issue, *A Study of the California Penalty Jury in First-Degree Murder Cases*, 21 Stan. L. Rev. 1297, 1301, 1307, 1366-68, 1421 (1969).[129]

As is indicated by the figures in the preceding table, a determination whether there is racial discrimination must take into account factors other than the percentage of a particular minority in the general population. Most relevant is the number of offenses, punishable by death, which are committed by the particular minority group.[130]

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[128]Amsterdam, Comment, *Racism in Capital Punishment: Impact of McGautha v California*, 1 Black L. J. 185 (1971): "The long term effect of the McGautha decision is to license a system of capital sentencing in which individual juries are permitted to decree life or death as they wish, free of any legal constraint. In a society which is deeply infected by racism, this discretion inevitably metes out death to black men, in many cases, simply because they are black."

[129]*See also* Report of New Jersey Commission to Study Capital Punishment 9-10 (October, 1964).

[130]Thus even a noted abolitionist concedes, in finding no significant indication of the influence of race in the imposition of the death penalty, that "[f]or many decades there has been ample evidence that Negroes in this country commit three to six times more crimes than their population ratio to whites would lead one to expect." Bedau, *Death Sentences in New Jersey 1907-1960*, 19 Rutgers L. Rev. 1, 19, 21 (1964). Interestingly enough, 27% of the total number of arrests in the United States are of Negroes, as are 36.4% of the number of arrests for the seven major felonies; however, 58.9% of the arrests for murder and non-negligent manslaughter are of Negroes. Federal Bureau of Investigation, Uniform Crime Reports—1970 (Table 32) 131 (August 31, 1971). One observer has concluded, "the circumstances of life surrounding large numbers of Negroes in the United States generate violence, assault, and murder . . ." Schuessler, *The Deterrent Influence of the Death Penalty*, 284 Annals of the Am. Acad. of Pol. and Soc. Sci. 54, 61 (Nov. 1952.)

Some abolitionists, however, while conceding the absence of race as a factor in jury determination of punishment in capital cases, assert "that the race of the offender may be a significant indication of whether a death sentence will be carried out or voided by clemency."[131]

The following figures graphically demonstrate that race plays no part in the granting or denial of clemency in capital cases in California; indeed, the percentage of Negroes receiving commutation of their death sentences is shown to be identical to the percentage of Negroes presently under sentence of death in California (as indicated in the preceding table).

[131]Bedau, 19 Rutgers L. Rev., *supra* at 21.

TABLE G

Race and the Commutation of Death Sentences in California 1959-1971[183]

	Total	Caucasians	Negroes
Governor Edmund G. Brown 1959-1966 (35 Executions)	23	18 (78.3%)	5 (21.7%)
Governor Ronald Reagan 1967-1971 (1 Execution)	1	0 (0%)	1 (100%)
Total	24	18 (*75.0%*)	6 (25.0%)

In the context of the data appearing in the preceding two tables, it is abundantly clear that the death penalty is not discriminatorily applied against Negroes in California, as is so frequently implied in the general charge of universal racial discrimination in the imposition of this form of punishment. Negroes are convicted of 36.7% of the first degree murders and yet comprise only 25% of the death sentences today. Although Negroes comprise only 18.6% of the executions for murder in the last forty years, they have received 25% of the commutations in recent years.

Moreover, what is so often forgotten is the fact that members of racial minorities, the poor, and the uneducated seem to be the persons most in need of the protection of the death penalty, since they are apparently the most frequent victims of murderers. Negroes comprise 54.9% of the murder victims in this country,[184] and although the most recent national poll on

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[183]This data is compiled from the files of the California State Prison at San Quentin.

[184]Federal Bureau of Investigation, Uniform Crime Reports—1970 (Table 22) 118 (August 31, 1971).

the death penalty does not indicate the figures by race, it does show that that form of punishment is favored by a majority of persons in the lowest income, educational, and occupational groups.[184]

It is also clear that the opponents of capital punishment are incorrect in their assertion that the death penalty is discriminatorily imposed upon the poor, or persons of the lowest socio-economic status, because with rare exceptions that punishment purportedly is meted out only to unskilled laborers.[185]

If petitioner were correct in his characterization of California's death row population, it would prove little, for the greatest number of crimes for which death is deemed the appropriate punishment involve a killing for economic gain.[186] To put it more bluntly, as some have more sagely observed wealthy persons do not customarily engage in the type of activity, such as holding up liquor stores, which so often results in the

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[184]Gallup International Inc., Gallup Opinion Index 15 (Report No. 45, March, 1969), reprinted in Erskine, *The Polls: Capital Punishment*, 34 Pub. Op. Q. 290, 292-94 (1970).

[185]Some commentators have viewed the allegedly less-advantaged background of those defendants sentenced to death as indicative of affirmative jury discrimination in singling out such persons for the imposition of capital punishment. *See* Special Issue, *A Study of the California Penalty Jury in First-Degree Murder Cases*, 21 Stan. L. Rev. 1297, 1307, 1367, 1379, 1430-31 (1969). Others have disputed this conclusion. *Cf.* Preface by H. Kalven, *id.*, 1300-01 ("the authors risk being corrupted somewhat by their passion for turning their findings into constitutional arguments against the death penalty").

[186]Appendix to Respondent's Brief; California Department of Corrections, Executions in California 1943 Through 1963 (Table 30) (1965).

needless death of the victim and the fixing of the offender's punishment at death.[127]

In this day when commendably we provide counsel and transcripts and other incidents of a legal defense free of charge to those who cannot afford them, it is absurd to premise an attack on the death penalty on speculation that juries for some reason single out poor people for the extreme penalty.

Examination of the files of the California State Prison at San Quentin indicates that although a large number of prisoners under current sentence of death are unskilled laborers, the occupations indicated for such prisoners also include electronics technician, salesman, student, male nurse, warehouseman, food processor, postal investigator, machinist, butcher, secretary, television technician, security guard, typewriter repairman, psychiatric technical trainee, painter, longshoreman, theater manager, blueprint reader, architect, machine operator, police officer, health spa manager, carpenter, mechanic, public relations, tailor, and pest control worker. Other studies confirm the impression that these individuals represent a broad cross-section

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[127]"If statistics show that more poor persons are executed than rich persons, it could be because more poor than rich commit murders. But it does not follow that they were executed because they were not competently and adequately defended. The simple fact is that rich people rarely commit murder. Obviously they need not commit armed robberies in order to obtain money. If a rich person kills another person, it is apt to be an impulsive act done in a fit of emotional upheaval without the wilfulness and premeditation required to support a murder first degree verdict or judgment." Coakley, *Capital Punishment*, 1 Am. Crim. L. Q. 27, 34 (May, 1963). *See also* Report of New Jersey Commission to Study Capital Punishment 9 (October, 1964); Van Den Haag, *Deterrence and the Death Penalty*, 60 J. Crim. L. C. & P.S. 141, 142(n.4) (1969.)

of skilled and unskilled occupations.[138] One study indicates that the income level of those persons sentenced to death for murder, as well as of those actually executed, is higher than that of the persons who received a sentence of life imprisonment for first degree murder.[139]

Data on the education of California prisoners under sentence of death or awaiting new penalty trials is available in the files of all but five cases and indicates a median (and average) education of 10th grade.[140] Seven individuals have in excess of a 12th grade education.

The foregoing dispels the myth that it is, with few exceptions, the uneducated defendant upon whom the death penalty is imposed. Although figures on the actual educational attainment of prisoners not under death sentence is unavailable, it is interesting to note that in California "the median grade achievement scores of the male felons newly received from court have been at the eighth grade level."[141]

Respondent's examination of the files disclosed that only fragmentary I.Q. data are available, mainly because a large number of prisoners refuse to be tested,

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[138]*See* Einstoss, "Most Men on Death Row Are Skilled Workmen," Los Angeles Times, Part II, p. 6 (May 26, 1967); California Department of Corrections, Executions in California 1943 Through 1963 (Table 7) (1965); Coakley, *supra* at 34-35(n.13).

[139]Coakley, *supra.*

[140]*See also* California Department of Corrections, Executions in California 1943 Through 1963 (Table 5) (1965), indicating that the greatest number of prisoners executed during the period covered were in the grade 9-11 range.

[141]California Department of Corrections, California Prisoners—1968, 36 (1969).

but that such data ranged from a low of 70 I.Q. (two individuals) to a high of 136 (two individuals). A more complete sampling directed to the intelligence level of California prisoners executed between 1943-1963 (only one prisoner has been executed in the State since 1963) indicates that, in the 128 cases (out of the total 158) in which data was available, the vast majority (80.4%) came within the range of normal intelligence level with 8.6% borderline and 2.4% defective, and 7.0% superior and 1.6% very superior.[142]

Petitioner's attack on the manner in which juries decide which murder defendants are to receive the death penalty was in essence answered by this Court's opinion in *McGautha v. California*, 402 U.S. 183, and respondent will add only the observation that every one of the capital cases reviewed by the California Supreme Court since 1965 indicates the presence of at least one aggravating circumstance that would call for the death penalty under the standards of the Model Penal Code drafted by the American Law Institute and set forth as an appendix to the opinion in *McGautha, supra* at 222-25. *See* Appendix to Respondent's Brief. Thus with respect to California there is no basis for petitioner's assertion that juries may be arbitrarily im-

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[142]California Department of Corrections, Executions in California 1943 Through 1963 (Table 6) (1965). *See also* Report of New Jersey Commission to Study Capital Punishment 9 (October, 1964): "From all the information studied by the Commission so far as it affects the State of New Jersey, and from similar information found for a number of states which have made studies, the Commission believes that the intellectual attainment of persons sentenced to death and executed is a rough cross-section of that of the prison population at large."

posing the death penalty where there is little justification for it.[143]

Although the possibility of error is present whenever a decision between life and death must be made, *Williams* v. *New York*, 337 U.S. 241, 251-52, neither petitioner nor *amici* have called the attention of this Court to a single case in which an innocent defendant has been executed under the procedural safeguards available in our American system of justice[144] at the trial, on appeal, and in clemency proceedings.[145] But were such a miscarriage of justice to occur, it would, like the conviction of an innocent man in a non-capital case, suggest improvement of the foregoing procedures rather than abolition of the death penalty or the closing of our prisons.

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[143]Paradoxically petitioner argues (Pet. Br. 6) that the small portion of murderers sentenced to death indicates arbitrariness in the determination of penalty. Undoubtedly if a large portion were to be sentenced to death, petitioner would argue that the failure of juries to distinguish among offenders and offenses amounted to cruel and unusual punishment. Respondent submits that the decision of juries to limit the supreme penalty to the most heinous of murders shows that juries are discriminating rather than discriminatory.

[144]The assertion at pages 20-21 of the brief of *amici* Nat'l Council of Churches of Christ, *et al.*, that Caryl Chessman's execution would have been barred by later judicial decisions reinterpreting the elements of his crime (kidnaping) is untrue, since that reinterpretation was founded on a statutory amendment effective long after Chessman was convicted, and his case was properly decided under the law applicable at the time. *See People v. Daniels*, 71 Cal. 2d 1119, 1139 [459 P.2d 225, 238] (1969).

[145]*See, e.g.*, Cal. Pen. Code. §§ 1181(6)(7), 1239(b), 4801, 4812. Existing California statutes and case law indicate the truth of the statement, "Trials are more likely to be fair when life is at stake . . ." Van Den Haag, *Deterrence and the Death Penalty*, 60 J. Crim. L. C. & P.S. 141, 142 (1969). *See also Stein v. New York*, 346 U.S. 156, 196.

Nor have any but the most aberrant and isolated instances been shown involving individuals who kill in order to be killed by the state.

And the negligible rate of suicides by prisoners under sentence of death is not compared to the equally unknown rate of suicides by prisoners serving terms of life imprisonment[146] and may well be lower, bearing out the point of view of some that a true sentence of life without possibility of parole may be a punishment more cruel than death.[147]

In short, petitioner has failed to demonstrate anything arbitrary, discriminatory, or unfair in the manner in which the death penalty is imposed. Indeed it is evident that prisoners under sentence of death constitute a strikingly representative cross-section of California's criminal population.

E. Death Is Not a Cruel and Unusual Punishment for Petitioner, the Unrepentant Perpetrator of Three Known, Separate Murders Committed for Pecuniary Gain and Sexual Gratification

It remains only to consider briefly a few of the salient aspects of petitioner's own case in relation to his claim that the death penalty for murder constitutes cruel and unusual punishment.

Initially one is confronted with the circumstance that on three separate occasions, petitioner wantonly

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[146]In a recent seven-year period 195 prisoners in the custody of correctional and law enforcement agencies died as the known result of suicide in the State of California. California Bureau of Criminal Statistics, Death in Custody—California 1962-1968 (Table III) 9 (1969).

[147]One defendant sentenced to death in 1958, and in 1960 commuted to life without possibility of parole, committed suicide in 1964. California Department of Corrections, Executions in California 1943 through 1963 (Appendix V) (1965.)

extinguished human life—first the life of Kathleen Nell Dodd and her five month-old male fetus, in a savage knife attack after he had raped and robbed her; secondly the life of Clyde J. Hardaway, in a sordid scene in which the victim was shot in the forehead as he kneeled to perform a sexual act upon petitioner; and thirdly the life of Mary Winifred Eaton, a woman in her sixties, whose age and previous befriending of petitioner was not enough to spare her from being raped and fatally stabbed by the venerrally-diseased petitioner. Added to these known murders is a host of violent felonious behavior going back to petitioner's childhood and occurring between repeated incarcerations and failures at rehabilitation. (R. 1375, 1966-67.) Even petitioner's present counsel concede that his crimes were "ghastly" and "aggravated" and forego any "claim that if the death penalty can constitutionally be inflicted for any such crime [civilian and peacetime], it cannot be inflicted, upon this petitioner." (Pet. Br. 4-5.)

There is no indication that petitioner's race played a part in the decision of the trier of fact, a judge, to fix petitioner's punishment at death. On the contrary, the trial judge's findings (R. 4890-4992), set forth in part at pp. 29-34 *infra*, indicate a compassionate consideration for petitioner's not-very-disadvantaged background and race. These findings, made on evidence summarized at the outset of this brief, make it indisputably clear that petitioner was not sentenced to death because of his race or socio-economic background. He received an education, was considered intelligent and not in any way psychotic or mentally defective, and although usually unemployed was apparently so at his own choosing, preferring to live off the hard-earned money of his elderly mother, who did housework for a living. As

indicated in the findings of the trial court (R. 4900-01, *infra* p. 32), petitioner had the opportunity to emulate the commendable accomplishments of his two sisters. (R. 4604.)

Petitioner received an abundance of due process in excess of anything required by the Constitution. Two attorneys (whose competence the court recognized) were appointed to represent him, a third was appointed to consult with him on a limited basis, and $1850.00 was allowed defense counsel as expenditures for investigation, psychiatric diagnosis, and medical tests. Also granted were petitioner's motions for discovery of the prosecution's evidence.[148] Yet the defense was unable to produce any evidence indicating insanity or diminished mental capacity on petitioner's part.

Only a wealthy man could have afforded such a trial which, excluding pretrial and sentencing proceedings, extended with some interruptions from November 24, 1965, to March 16, 1966. (R., Cl. Tr. II, pp. 115, 274.) And can it for a moment be imagined that had petitioner been Caucasian, college-educated, and professionally employed, these circumstances would have caused the trier of fact to sentence petitioner to only life imprisonment in the face of petitioner's unrepentant attitude toward three brutal slayings and an assortment of other violent offenses? Particularly significant is petitioner's callous bragging to other inmates about the murders and petitioner's statement, while awaiting trial on the present charges, to a fellow inmate, that "if they can't get him out of that county jail, he was going to kill someone else." (R. 1133.) This demonstrates the validity of the conclusion, reached by the

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[148](R., Cl. Tr. I, pp. 4, 6, 20; Cl. Tr. II, pp. 115, 269-70; Cl. Tr. III, pp. 3, 19; R. 3373.)

chiatrists and the psychologist, that the likelihood
petitioner, a person without mental disorders,
ld ever be rehabilitatable was very slight. (See pp.
26, *infra*.) There certainly can be little doubt
o whether petitioner would kill again if paroled
a life sentence.

inally, are petitioner and the other prisoners under
ence of death truly the "friendless?" (Pet. Br. 54.)
le from all that was accorded petitioner at his trial
on appeal in the California Supreme Court, such
ssertion has a hollow if not ironic ring on the basis
e of petitioner's having 14 counsel of record in the
ent proceedings before this Court, quantitatively
rfing the resources of the State,[149] in addition to
having the support of nine briefs *amici curiae* on
lf of a multitude of individuals and organizations.

learly the death penalty is not cruel and unusual
shment, either as a general proposition or as im-
d under the particular facts of petitioner's case.

CONCLUSION

an era characterized by rising crime rates, mass
gs, inmate homicides, revolutionary bombings of
c buildings, and the assassination of political
rs and law enforcement officers,[150] it would be
y inappropriate for a legislature to contravene the
of the people by abolishing capital punishment,
one for this Court under the aegis of the Eighth

ee also Maxwell v. Bishop, 398 F.2d 138, 141 (8th Cir.
, *vac'd*, 398 U.S. 262.

he number of law enforcement officers murdered in the
States rose from 37 in 1961 to 100 in 1970. Federal
of Investigation, Uniform Crime Reports—1970, 44
st 31, 1971.)

Amendment to decree that this form of punishment, expressly sanctioned by the wording of the Constitution and a long line of decisions by this Court, is now forbidden to the people of the various States.

A justice of the California Supreme Court once noted,

"Probably all of us who have thought on the subject—and particularly those of us who have some responsibility in these cases (even as remote as it is at the appellate level)—devoutly wish that the death penalty were no longer necessary. But we have not yet reached the state which Sir Thomas More envisioned . . .[of] a Utopian government."[151]

As Justice Harlan stated for the Court in *McGautha v. California*, 402 U.S. 183, the Court's "function is not to impose on the States, *ex cathedra*, what might seem to us a better system for dealing with capital cases. Rather, it is to decide whether the Federal Constitution proscribes the present procedures . . . in these cases." *Id.*, 195-196. "[T]he question for decision is not whether we personally approve the procedures followed . . . The question is whether those procedures fall below the minimum level the Fourteenth Amendment will tolerate." *Spencer v. Texas*, 385 U.S. 554, 569 (Stewart, J., concurring.)

Respondent earnestly maintains that nothing has happened in the 180-year history of the Constitution, or in the 300-year history of the imposition of capital punishment in this nation, which can alter the fact of the Framers' contemplation of the death penalty as a

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[151]*People v. Love*, 56 Cal. 2d 720, 745 [366 P.2d 33, 47] (1961) (Schauer, J., dissenting).

orm of punishment of necessity available to the States or the protection of society. It is therefore urged that he judgment of the California Supreme Court, upholding petitioner's judgment of conviction imposing the eath penalty, be affirmed in its entirety.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General of the State of California,

WILLIAM E. JAMES,
Assistant Attorney General of the State of California,

RONALD M. GEORGE,
Deputy Attorney General of the State of California,

Attorneys for Respondent.

APPENDIX.

TABLE H.

Defendants Under Sentence of Death Reviewed by the California Supreme Court 1965-1971.[1a]

	DIRECT APPEALS			COLLATERAL ATTACKS WHERE ORDER TO SHOW CAUSE ISSUED	
	Total	Affirmed in Entirety	Death Penalty, Conviction, or Both Set Aside	Writ Denied	Writ Granted—Death Penalty, Conviction, or Both Set Aside
ept 1 1967	50	25(50%)	25(50%)	0	4
ept 1 1971	60	19(32%)	41(68%)	0	15
ept 1 1971	110	44(40%)	66(60%)	0	19

CAPITAL CASES REVIEWED BY THE CALIFORNIA SUPREME COURT BETWEEN SEPTEMBER 1, 1965, AND SEPTEMBER 1, 1967

A. *Direct Appeals Affirmed in Entirety*

People v. Jacobson, 63 Cal. 2d 319 (1965) [405 P. 2d 555] (premeditation and exceptional heinousness

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[1a]Some defendants appear in this table more than once in hat their judgment imposing the death penalty was considered successive proceedings by the court. Defendant Gilbert in *eople v. Gilbert*, 63 Cal. 2d 690, appears in one instance as oth an affirmance and a reversal due to the fact that in a single roceeding one count imposing the death penalty was reversed nd another such count affirmed. The cases comprising this ible are collected below, with references to which theory, or hich felony under the felony-murder rule, formed the basis for ing the murder in the first degree. Other distinguishing feaures of the offense particularly pertinent to the determination f penalty are also indicated. In approximately 5% of the cases ry trial was waived and the issue of penalty tried to the court. The vast majority of these 129 cases involves the offense of rst-degree murder, and the remaining few involve the offenses kidnapping for gain with bodily harm or assault with a deadly eapon or with force likely to produce great bodily injury, by a isoner under life sentence. Cal. Penal Code, §§ 187, 209, 00.

—drowning of 21-month-old child; *commuted* by Governor in 1966); *People v. Cotter*, 63 Cal. 2d 386 (1965) [405 P. 2d 862] (robbery; *commuted* by Governor in 1966); *People v. Mathis*, 63 Cal. 2d 416 (1965) [406 P. 2d 65] (robbery); *People v. Gilbert*,[2a] 63 Cal. 2d 690 (1965) [408 P. 2d 365], *vac'd*, 388 U.S. 263 (robbery, victim police officer); *People v. Smith*, 63 Cal. 2d 779 (1966) [409 P. 2d 222] (burglary, double murder, both victims police officers); *People v. Mitchell*, 63 Cal. 2d 805 (1966) [409 P. 2d 211] (robbery, victim police officer) [defendant sole person to be executed in California from 1964 to the present]; *People v. La Vergne*, 64 Cal. 2d 265 (1966) [411 P. 2d 309] (robbery); *People v. Anderson*, 64 Cal. 2d 633 (1966) [414 P. 2d 366] (robbery, and attempt to kill two police officers and a fourth victim); *People v. Talbot*, 64 Cal. 2d 691 (1966) [414 P. 2d 633] (robbery, mutilation); *People v. Reeves*, 64 Cal. 2d 766 (1966) [415 P. 2d 35] (robbery, and attempt to murder a second victim, court trial); *People v. Seiterle*, 65 Cal. 2d 333 (1966) [420 P. 2d 217] (robbery, double murder); *People v. Roberts*, 65 Cal. 2d 514 (1966) [421 P. 2d 420] (robbery); *People v. Thomas*, 65 Cal. 2d 698 (1967) [423 P. 2d 233] (arson and exceptional heinousness—molotov cocktail thrown into bedroom of three-year-old victim; *commuted* by Governor in 1967); *People v. Tahl*, 65 Cal. 2d 719 (1967) [423 P. 2d 246] (robbery, double murder, subsequent murder, subsequent attempt to kill fourth person, and statement of intention to kill fifth person); *People v. Saterfield*, 65 Cal. 2d 752 (1967) [423 P. 2d 266] (premeditation, double murder, prior murder convic-

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[2a]This case is listed twice, as an affirmance as to one murder count and as a reversal as to the other murder count.

tion); *People v. Arguello*, 65 Cal. 2d 768 (1967) [423 P. 2d 202] (robbery, exceptional heinousness—82-year-old victim beaten to death with brick and hammer); *People v. Hillery*, 65 Cal. 2d 795 (1967) [423 P. 2d 208] (rape of 15-year-old victim); *People v. Sanchez*, 65 Cal. 2d 814 (1967) [423 P. 2d 800] (murder of civilian prison employee by prisoner serving life sentence); *People v. Eli*, 66 Cal. 2d 63 (1967) [424 P. 2d 356] (rape); *People v. Lookadoo*, 66 Cal. 2d 307 (1967) [425 P. 2d 208] (robbery and exceptional heinousness—setting live victim on fire with burning gasoline, court trial; *commuted* by Governor in 1966); *People v. Hines*, 66 Cal. 2d 348 (1967) [425 P. 2d 557] (robbery); *People v. Hill & Saunders*, 66 Cal. 2d 536 (1967) [426 P. 2d 908] (robbery, second murder attempted, two capital defendants); *People v. Modesto*, 66 Cal. 2d 695 (1967) [427 P. 2d 788] (double murder, exceptional heinousness—committing sexual acts upon,[a*] and beating to death, nine and twelve-year-old victims with sledgehammer, prior murder); *People v. Massie*, 66 Cal. 2d 899 (1967) [428 P. 2d 869] (robbery, second murder attempted, court trial).

B. *Direct Appeals Reversed as to Death Penalty, Conviction, or Both*

People v. Anderson, 63 Cal. 2d 351 (1965) [406 P. 2d 43] (premeditation, sexual acts upon ten-year old female victim); *People v. Price*, 63 Cal. 2d 370 (1965) [406 P. 2d 55] (robbery, double murder, both

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[a*]Rape, sodomy, sexual perversion, and other sexual offenses punishable under the California Penal Code, when committed upon a child under the age of fourteen, are punishable under section 288 of the code as the separate offense of lewd or lascivious acts upon the body of a child under the age of fourteen.

victims police officers); *People v. Polk & Gregg*, 63 Cal. 2d 443 (1965) [406 P. 2d 641] (robbery, heinous mutilation of victim, and evidence of prior homicides by one of the two capital defendants); *People v. Luker*, 63 Cal. 2d 464 (1965) [407 P. 2d 9] (robbery); *People v. Stockman*, 63 Cal. 2d 494 (1965) [407 P. 2d 277] (robbery); *People v. Arguello*, 63 Cal. 2d 566 (1965) [407 P. 2d 661] (robbery, exceptional heinousness—82-year-old victim beaten to death with brick and hammer); *People v. Gilbert*, 63 Cal. 2d 690 (1965) [408 P. 2d 365] (robbery); *People v. Ketchel & Sears*, 63 Cal. 2d 859 (1966) [409 P. 2d 694] (robbery, victim police officer, two capital defendants); *People v. Treloar*, 64 Cal. 2d 141 (1966) [410 P. 2d 620] (robbery); *People v. Ford*, 65 Cal. 2d 41 (1966) [416 P. 2d 132] (robbery, premeditation, victim police officer); *People v. Butler*, 65 Cal. 2d 569 (1967) [421 P. 2d 703] (robbery); *People v. Goedecke*, 65 Cal. 2d 850 (1967) [423 P. 2d 777] (premeditation, quadruple murder); *People v. Nicolaus*, 65 Cal. 2d 866 (1967) [423 P. 2d 787] (premeditation, triple murder); *People v. Spencer*, 66 Cal. 2d 158 (1967) [424 P. 2d 715] (robbery, second murder attempted); *People v. Griffin*, 66 Cal. 2d 459 (1967) [426 P. 2d 507] (rape); *People v. Gonzales*, 66 Cal. 2d 482 (1967) [426 P. 2d 929] (robbery, second murder attempted); *People v. Pennington*, 66 Cal. 2d 508 (1967) [426 P. 2d 942] (double murder and sexual acts upon a female murder victim under the age of fourteen); *People v. Bandhauer*, 66 Cal. 2d 524 (1967) [426 P. 2d 900] (robbery); *People v. Wilson*, 66 Cal. 2d 749 (1967) [427 P. 2d 820] (premeditation, double murder); *People v. Vanum*, 66 Cal. 2d 808 (1967) [427 P. 2d 772] (rob-

bery); *People v. Powell & Smith*, 67 Cal. 2d 32 (1967) [429 P. 2d 137] (premeditation, double murder, both victims police officers, two capital defendants); *People v. Jackson*, 67 Cal. 2d 96 (1967) [429 P. 2d 600] (rape, offense committed only a few days after defendant's release from nine-year prison term, court trial).

C. *Writs Denied After Issuance of Order to Show Cause*

None.

D. *Writs Granted Setting Aside Death Penalty, Conviction, or Both*

In re Spencer, 63 Cal. 2d 400 (1965) [406 P. 2d 33] (robbery); *In re Varnum*, 63 Cal. 2d 629 (1965) [408 P. 2d 97] (robbery); *In re Pike*, 66 Cal. 2d 170 (1967) [424 P.2d 724] (robbery, victim police officer); *In re Shipp*, 66 Cal. 2d 721 [427 P. 2d 761] (robbery, victim killed for 10¢).

II CAPITAL CASES REVIEWED BY THE CALIFORNIA SUPREME COURT BETWEEN SEPTEMBER 1, 1967, AND SEPTEMBER 1, 1971

A. *Direct Appeals Affirmed in Entirety*

People v. Lara, 67 Cal. 2d 365 (1967) [432 P.2d 202] (robbery); *People v. Beivelman*, 70 Cal. 2d 60 (1968) [447 P.2d 913] (robbery and exceptional heinousness—victim beaten to death with hammer); *People v. Durham & Robinson*, 70 Cal. 2d 171 (1969) [449 P.2d 198] [Robinson sole capital defendant] (robbery, defendant parole escapee, victim police officer); *People v. Aikens*, 70 Cal. 2d 369 (1969) [450 P.2d 258] (rape and robbery, double murder, prior murder, court trial) [the case at bar];

People v. Varnum, 70 Cal. 2d 480 (1969) [450 P.2d 553] (robbery); *People v. Hill*, 70 Cal. 2d 678 (1969) [452 P.2d 329] (robbery, rape, and sodomy upon pregnant victim); *People v. McGuatha*, 70 Cal. 2d 770 (1969) [452 P.2d 650] (robbery, prior murder); *People v. Tolbert*, 70 Cal. 2d 790 (1969) [452 P. 2d 661] (rape and sodomy); *People v. Coogler*, 71 Cal. 2d 153 (1969) [454 P.2d 686] (robberies, double murders); *People v. Nye*, 71 Cal. 2d 356 (1969) [455 P.2d 395] (robbery and rape, exceptional heinousness—victim stabbed 37 times); *People v. Mabry*, 71 Cal. 2d 430 (1969) [455 P.2d 759] (burglary, victim police officer, several prior felony convictions including prison escape); *People v. Miller*, 71 Cal. 2d 459 (1969) [455 P.2d 377] (commission of sexual acts upon eight-year-old victim); *People v. Pike*, 71 Cal. 2d 595 (1969) [455 P.2d 776] (robbery, victim police officer); *People v. Robles*, 71 Cal. 2d 924 (1969) [458 P.2d 67] (robbery and premeditation); *People v. Floyd & Milton*, 1 Cal. 3d 694 (1970) [464 P.2d 64] (robbery of municipal bus driver, two capital defendants); *People v. King*, 1 Cal. 3d 791 [463 P.2d 753] (robbery); *People v. Terry*, 2 Cal. 3d 362 (1970) [466 P.2d 961] (robbery and exceptional heinousness —pharmacist stabbed 17 times with scissors and shot four times); *People v. Archerd*, 3 Cal. 3d 615 (1970) [477 P.2d 421] (murder of six persons by insulin injections.)

B. *Direct Appeals Reversed as to Death Penalty, Conviction, or Both*

Peope v. Bassett, 69 Cal. 2d 122 (1968) [443 P.2d 777] (premeditation, double murder); *People v. McDowell*, 69 Cal. 2d 737 (1968) [447 P.2d 97]

(robbery); *People v. White*, 69 Cal. 2d 751 (1968) [446 P. 2d 993] (robbery and rape); *People v. Chacon & Noah*, 69 Cal. 2d 765 (1968) [447 P.2d 106] (near-fatal assault by prisoners serving life terms, numerous prior felonies committed by each of the two capital defendants, including murder by one and assault with a deadly weapon on a police officer by another); *People v. Anderson*, 70 Cal. 2d 15 (1968) [447 P.2d 942] (premeditation, sexual acts upon ten-year-old female victim); *People v. Risenhoover*, 70 Cal. 2d 39 (1968) [447 P.2d 925] (robbery and premeditation); *People v. Bradford*, 70 Cal. 2d 333 (1969) [450 P.2d 46] (premeditation and exceptional heinousness—death caused by pouring sulphuric acid on victim); *People v. Terry*, 70 Cal. 2d 410 (1969) [454 P.2d 36] (robbery, victim police officer); *People v. Teale*, 70 Cal. 2d 497 (1969) [450 P.2d 564] (robbery); *People v. Sanchez*, 70 Cal. 2d 562 (1969) [451 P.2d 74] (murder of civilian prison employee by prisoner serving life term); *People v. Fain*, 70 Cal. 2d 588 (1969) [451 P.2d 65] (rape and sex perversion, with prior rape and prior attempted rape); *People v. Morse*, 70 Cal. 2d 711 (1969) [452 P.2d 607] (premeditation, while awaiting sentencing on retrial for two capital murders defendant killed fellow prisoner who owed him cigarettes); *People v. Osuna & Gorman*, 70 Cal. 2d 759 (1969) [452 P.2d 678] (robbery, two capital defendants); *People v. Goodridge*, 70 Cal. 2d 824 (1969) [452 P.2d 637] (rape and sodomy, committed probably after victim's death, 107 stab wounds); *People v. Graham & Shepard*, 71 Cal. 2d 303 (1969) [455 P.2d 153] [Shephard only capital defendant] (robbery); *People v. O'Brien*, 71 Cal. 2d 394 (1969)

[456 P.2d 969] (robbery, victim police officer
People v. Vaughn, 71 Cal. 2d 406 (1969) [455 P.2
122] (assault on prison guard by prisoner serving li
sentence, defendant having previously killed three fe
low prisoners); *People v. Quicke*, 71 Cal 2d 5(
(1969) [455 P.2d 787] (premeditation and exce
tional heinousness—subsequent sexual intercourse wi
victim's corpse); *People v. Williams*, 71 Cal 2d 61
(1969) [456 P.2d 633] (robbery, strangulation
People v. Ketchel, 71 Cal. 2d 635 (1969) [456 P.2
660] (robbery, victim police officer); *People*
Schader, 71 Cal. 2d 761 (1969) [457 P.2d 841] (rol
bery, victim police officer); People v. McClellan, 7
Cal. 2d 793 (1969) [457 P.2d 871] (robbery, doubl
murder); *People v. Stanworth*, 71 Cal. 2d 820 (1969
[457 P.2d 889] (rape, double murder of 14 and 15
year-old girls, with numerous other prior and subse
quent acts of rape, sexual perversion, and robbery)
People v. Gardner, 71 Cal. 2d 843 (1969) [457 P.2
575] (robbery); *People v. Washington*, 71 Cal. 2
1061 (1969) [458 P.2d 479] (arson, three othe
murders attempted, exceptional heinousness — defend
ant poured gasoline into children's bedroom and lit it
17 month-old victim dying two weeks later); *Peopl
v. Daniels & Simmons*, 71 Cal. 2d 1119 (1969) [45
P.2d 225] (three counts against two capital defendant
of kidnaping for gain with bodily harm, each in th
vicinity of a university campus and involving rape, an
one involving sexual perversion; prior rapes and prio
kidnaping); *People v. Coleman*, 71 Cal. 2d 115
(1969) [459 P.2d 248] (robbery); *People v. Wash
ington*, 71 Cal. 2d 1170 (1969) [459 P.2d 259]
(robbery); *People v. Brawley & Baker*, 1 Cal. 3d
277 (1969) [461 P.2d 361] (robbery, two capital

defendants); *People v. Mosher*, 1 Cal. 3d 379 (1969) [461 P.2d 659] (robbery and rape); *People v. Wilson* 1 Cal. 3d 431 (1969) [462 P.2d 22] (premeditation, double murder); *People v. St. Martin*, 1 Cal. 3d 524 (1970) [463 P.2d 390] (fatal assault on prisoner by another prisoner serving a life term for a previous murder and robbery); *People v. Bandhauer*, 1 Cal 3d 609 (1970) [463 P.2d 408] (robbery); *People v. MacPherson*, 2 Cal. 3d 109 (1970) [465 P.2d 17] (robbery); *People v. Robles*, 2 Cal. 3d 205 (1970) [466 P.2d 710] (murder, premeditated and fatal assault on prisoner by another prisoner serving a life term for prior murder and assault with intent to commit murder); *People v. Tidwell (William)*, 3 Cal. 3d 62 (1970) [473 P.2d 748] (robbery, triple murder); *People v. Tidwell (Robert)*, 3 Cal. 3d 82 (1970) [473 P.2d 762] (robbery, triple murder).

C. *Writs Denied After Issuance of Order to Show Cause*

None.

D. *Writs Granted Setting Aside Death Penalty, Conviction, or Both*

In re Anderson & Saterfield, 69 Cal. 2d 613 (1968) [447 P.2d 117] (as to Anderson: robbery, and attempt to kill two police officers and a fourth victim; as to Saterfield: premeditation, double murder, prior murder conviction); *In re Mathis*, 70 Cal. 2d 467 (1969) [450 P.2d 290] (robbery); *In re Morse*, 70 Cal. 2d 702 (1969) [452 P.2d 601] (premeditation, double murder); *In re Arguello*, 71 Cal. 2d 13 (1969) [452 P.2d 921] (robbery, exceptional heinousness—82-year-old victim beaten to death with brick and hammer); *In re Eli*, 71 Cal. 2d 214 (1969) [454 P.2d

337] (rape); *In re Seiterle*, 71 Cal. 2d 698 (1969) [456 P.2d 129] (robbery, double murder); *In re Hillery*, 71 Cal. 2d 857 (1969) [457 P.2d 565] (rape of 15-year-old victim); *In re Hill & Saunders*, 71 Cal. 2d 997 (1969) [458 P.2d 449] (robbery, second murder attempted, two capital defendants); *In re Tahl*, 1 Cal. 3d 122 (1969) [460 P.2d 449] (robbery, double murder, subsequent murder, subsequent attempt to kill fourth person, and statement of intention to kill fifth person); *In re Kemp*, 1 Cal. 3d 190 (1969) [460 P.2d 481] (rape, with rapes of two other victims); *In re Lara*, 1 Cal. 3d 486 (1969) [462 P.2d 380] (robbery); *In re Roberts*, 2 Cal. 3d 892 (1970) [471 P.2d 481] (robbery); *In re Saunders*, 2 Cal. 3d 1033 (1970) [472 P.2d 921] (robbery, second murder attempted).

Service of the within and receipt of a c
thereof is hereby admitted this 23rd
of September A.D. 1971.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

HARRIET JAMES ATKINS, JR., *Petitioner*
v.
STATE OF CALIFORNIA
No. 69-5037

On Writ of Certiorari to the Supreme Court of California

WILLIAM HENRY FURMAN, *Petitioner*
v.
STATE OF GEORGIA
No. 69-5003

On Writ of Certiorari to the Supreme Court of Georgia

LUCIUS JACKSON, *Petitioner*
v.
STATE OF GEORGIA
No. 69-5030

On Writ of Certiorari to the Supreme Court of Georgia

ELMER BRANCH, *Petitioner*
v.
STATE OF TEXAS
No. 69-5031

On Writ of Certiorari to the Texas Court of Criminal Appeals

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

[*Amici Curiae* and attorney listed on inside cover]

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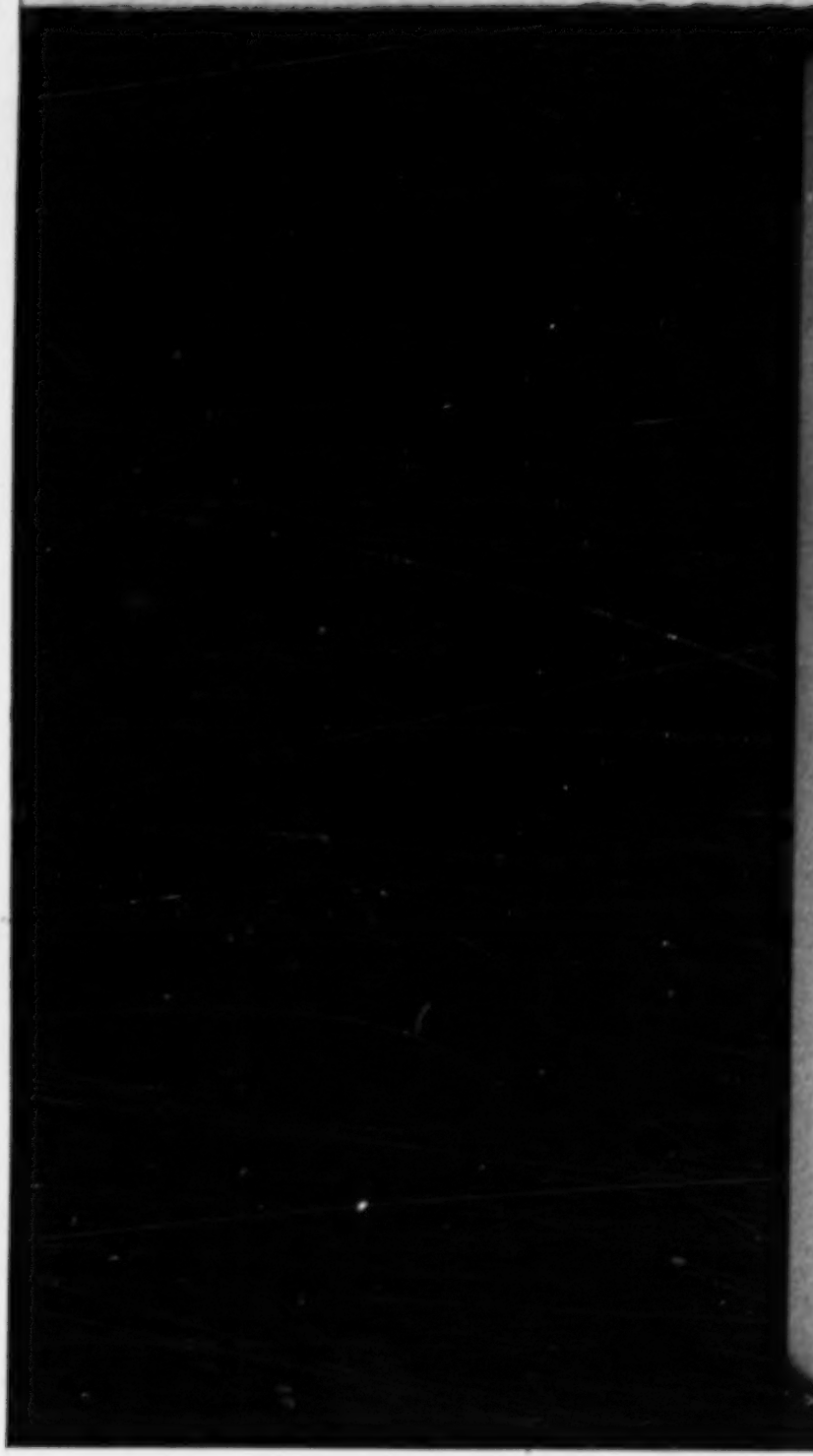

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OCTOBER TERM, 1971

EARNEST JAMES AIKENS, JR., *Petitioner*
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On Writ of Certiorari to the Texas Court of Criminal Appeals

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The movants hereto, Hon. Edmond G. Brown, former Governor of California, Hon. David F. Cargo, former Governor of New Mexico, Hon. Elbert N. Carvel,

former Governor of Delaware, Hon. Michael V. DiSalle, former Governor of Ohio, Hon. Philip H. Hoff, former Governor of Vermont, Hon. Theodore R. McKeldin, former Governor of Maryland, Hon. Endicott Peabody, former Governor of Massachusetts, Hon. Grant Sawyer, former Governor of Nevada and Hon. Milton J. Shapp, Governor of Pennsylvania, hereby respectfully move for leave to file the attached brief *amici curae* in this case The consent of the respondent, the State of Georgia, the respondent, the State of California, and the respondent, the State of Texas, was requested but was refused by all.

The interest of the foregoing individuals in this case arises from the fact that they are all presently or were formerly Governors in states where the death penalty is authorized by law, and in their official capacity as governors of their varied states have had intimate torturous experience with the death penalty.

While scholarly research and judicial logic can explore the application of theoretical bounds of the Constitution to the concept of capital punishment, these *amici* are uniquely qualified through personal experience to advise the court of the cruel and unusual nature of the death penalty. Each of these men has been in the position of sitting in final human judgment over the life of another human being; more final than that of the sentencing judge who had the knowledge that executive clemency might relieve him of the burden of taking another man's life; more final indeed, than the decision of this honorable Court. Each of these *amici* have witnessed the cruelty of the years-long suffering imposed upon the condemned, and the unusualness of the punishment in its discriminatory application to the poor, the ignorant, and the unpopular. Each can provide an

additional dimension to the question now before the court which counsel can only begin to suggest.

The brief of *amici curiae* is timely presented. Although time for filing briefs of the parties has passed, this Court has postponed consideration of these cases pending appointment of two additional Justices. The gravity of the question before the court, the finality (but for executive clemency) of its decision in these cases, and the fact that the court will neither be inconvenienced nor delayed due to the postponement of argument and decision in these cases, all suggest the propriety of the granting of this motion and the consideration by this Court of the brief *amici curiae.*

WHEREFORE movants respectfully request that this honorable Court grant leave to file the attached brief *Amici Curiae* in support of petitioners.

Respectfully submitted,

HON. EDMUND G. BROWN
HON. DAVID F. CARGO
HON. ELBERT N. CARVEL
HON. MICHAEL V. DISALLE
HON. PHILIP H. HOFF
HON. THEODORE R. MCKELDIN
HON. ENDICOTT PEABODY
HON. GRANT SAWYER
HON. MILTON J. SHAPP

By MICHAEL V. DISALLE
425 - 13th Street, N.W.
Washington, D. C. 20004
(202)-393-3300
Attorney for Amici Curiae

October, 1971

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v.
STATE OF TEXAS } No. 69-5031

On Writ of Certiorari to the Texas Court of Criminal Appeals

BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

The subscribers to this brief are men who in their official capacity as Governors of their various states,

have had intimate, torturous experience with the death penalty. They are Hon. Edmund G. Brown, former Governor of California, Hon. David F. Cargo, former Governor of New Mexico, Hon. Elbert N. Carvel, former Governor of Delaware, Hon. Michael V. DiSalle, former Governor of Ohio, Hon. Philip H. Hoff, former Governor of Vermont, Hon. Theodore R. McKeldin, former Governor of Maryland, Hon. Endicott Peabody, former Governor of Massachusetts, Hon. Grant Sawyer, former Governor of Nevada and Hon. Milton J. Shapp, Governor of Pennsylvania.

Not until one has watched the hands of a clock marking the last minutes of a condemned man's existence, knowing that he alone has the temporary Godlike power to stop the clock, can he realize the agony of deciding an appeal for executive clemency.

SUMMARY OF ARGUMENT

The death penalty is not a deterrant to those who would willfully take the life of another. History has repeatedly shown that people who actually witnessed public legal executions were often those who were later convicted and executed for similar offenses. The converse is also true. In places where the death penalty has been abolished, there has been no rise in the number of willful homicides committed.

Capital punishment is a relic of barbarism, and the sadism of earlier societies' methods of execution is nonetheless present, even though modern "more humane" methods may dispatch the convicted more quickly. The life-for-a-life principal of penology satisfies nothing but a lust for revenge which is degrading to the fabric of our society.

Legal execution is unconstitutionally cruel because it leaves no room for redemption and rehabilitation and subjects the condemned to years of terror on death row, until reprieve after reprieve, false hopes raised and dashed, and witness to others on death row going to a final doom which is uncertain for them only as to date, finally drives the condemned beyond the point of madness.

The punishment of execution is unusual in its application because among those found guilty of willfull homicide, it is generally the poor, the ignorant and the politically unpopular who suffer its consequences. In 1965, with 9,850 homicides committed, there were seven executions; in 1966, one, and since then, none. Those selected for execution appear chosen at random from among the unprivileged, with no rational method of applying the death penalty to those who, by legislation, are subject to it.

ARGUMENT

The Death Penalty Is a Cruel and Unusual Punishment Prohibited by the U.S. Constitution

Generally, the people who sit in death row waiting to know whether the Governor will permit them to live or to die, follow a uniform pattern. They are men and women who generally have not had the finances necessary to enlist the services of the peculiarly talented counsel so essential in manning this type of defense. They are generally unschooled, often illiterate, many times mentally inadequate, and frequently the result of local hysteria which cries for a vengeance that is extremely fleeting. They are the exception rather than the rule. It seems that somewhere, someone believes that the execution of one man among the

hundreds that are charged with willful homicide will serve as an example or a deterrent to society. Is it a deterrent?

Three Presidents of the United States had been assassinated before John Fitzgerald Kennedy was shot down in Dallas. All of their assassins died. Booth, who shot Lincoln, was killed while trying to escape his pursuers; his accomplices were hanged. Garfield's assassin, a disappointed office seeker, was executed. So was the anarchist who shot McKinley. Did this deter the men who took pot-shots at Theodore Roosevelt, Franklin D. Roosevelt, or Harry S. Truman? All of the previous examples did not deter Lee Harvey Oswald. The fact that Oswald was killed by Jack Ruby should have served to satisfy those who were seeking vengeance. Instead, the killing of Oswald by Jack Ruby produced intense indignation on the part of our citizens. But if we say that Ruby as an individual should not seek revenge, should we, as a people, seek it collectively?

To emphasize the futility of the death penalty as a deterrent, we might briefly review the case of Charles Justice. Justice was sentenced in 1902 to the Ohio State Penitentiary after a cutting scrape. He was assigned as a trusty to the housekeeping duties of the death house. In those days, the electric chair was considered inefficient. Since it was too large for the small, nervous type of prisoner, it would cause him to squirm in his seat and cause the electrodes to make imperfect contact. As a result, the powerful current would arc between the electrodes and the doomed man's body, causing flesh burns and an unpleasant odor which discommoded the witnesses and officiating representatives of the state. Charles Justice corrected

this deficiency by designing iron clamps which are still in use. They immobilized the limbs of the condemned man during his death reflexes and thus made for a neater execution.

For his service to his state, Charles Justice was granted extra time off and was paroled in April, 1910. In November of the same year, Justice returned to the penitentiary, the charge; murder in the first degree. On October 27, 1911, undeterred Charles Justice died in the electric chair he had made more lethal, immobilized by the clamps he had invented.

How cruel is cruel? Capital punishment is a relic of barbarism. The Lord Chief Justice of England wondered if the death penalty might not be a trifle severe in view of the prisoner's age. The trial judge argued against mercy on the grounds that William York's punishment would be an example deterring others from a life of crime. So William York was hanged for stealing a shilling from the man to whom he was apprenticed. He was ten years old. The place was London. The time was 1748.

Britain has come a long way along the road to civilization in the two centuries since the hanging of William York. In October 1965, not only the House of Commons, but the usually stuffy House of Lords, with a surprising two-to-one majority, voted to abolish the death penalty for a test period of five years, which will probably prove permanent. This enlightened legislation, although still behind most of Western Europe's, is far ahead of the United States', and marks a definite global trend.

Capital punishment is a relic of barbarism, it is immoral, it usurps for society the exclusive privilege of natural laws, it is futile because it does not deter

the homocidal criminal, and its finality precludes any possibility of correcting an error.

The eye-for-an-eye, life-for-a-life concept of penology is obviously based on the degrading principle that society, in punishing the criminal, is seeking revenge rather than justice. The strong strain of sadism that runs through a vindictive society's clamor for a wrongdoer's blood is evident in the fact that until rather late in this century (in the Western world, at least) the execution of the condemned has been something of a spectator sport.

The executioners of the Far East have been far more inventive in their spectacular cruelty than any 20th Century Western country, with the possible exception of Nazi Germany. The Chinese, of course, have long been recognized as leaders in the field, with their boiling in oil, leisurely dismemberment (The Hundred Slices) and similar refinements. The Mogul emperors of India, however, should be recognized for their ingenuity in dispatching criminals as well as for their building of such monuments as the Taj Mahal. Impalement, for instance, was very popular (except with the victims) in 17th Century Delhi.

The man to be put to death by impalement (possibly for stealing a mango or a handful of roasted chickpeas from the Emperor Aurangzeb's palace kitchens) was paraded naked past the eager spectators to the killing grounds, where a sharpened stake of heat-tempered bamboo had been erected. Two men, each holding one of the prisoner's bound arms, would lift him clear of the ground while a third separated the buttocks so that when the culprit was lowered briskly, the bamboo lance would penetrate the rectum as far as the sigmoid flexure. The executioners could then

step back and join the delighted crowd in watching the dance of death as the screaming wretch writhed and pirouetted on his tiptoes in an effort to stay the inexorable progress of the murderous bamboo through his vitals. When sheer exhaustion and loss of blood finally forced the thief to his knees, the point of the bamboo stake pierced his heart and the show was over. Justice—or something—had been done.

The early Siamese did pretty well in the way of spectacular capital punishment by throwing their criminals to the crocodiles. This possibly gave the Romans the idea of throwing Christians to the lions, although the Romans got better exposure by building huge stadia for their lionization carnivals. This may have been an improvement over the earlier Roman form of capital punishment by crucifixion (in itself an improvement over the crude Jewish practice of lapidation, with no strictures as to who was to throw the first stone), but it was a failure as a deterrent to the spread of Christianity.

The ancient Greeks, with their more temperate and philosophic civilization, did not feel it necessary to borrow from the annals of Oriental cruelty in exterminating their undesirables and nonconformists. A quiet cup of hemlock did away with the lawless and the contumacious without fuss, feathers or cheering crowds.

The Greek example, however, did not deter the rest of Europe from linking justice with sadism. Spain during the Inquisition made notable advances in the field of cruel and unusual punishment with the rack, the wheel, flaying alive and burning at the stake, although the popularity of auto-da-fê spread to other countries. Even today, although Spaniards have

managed to transfer most of their hostilities to the brave bulls, the Franco government, perhaps out of sentimental longing for the good old days, still retains garroting as an official form of capital punishment. Only a few years ago—August 17, 1963, to be exact—two men found guilty of terrorist bombing were garroted in Madrid. Awakened at dawn to be fitted with adjustable steel collars, they were slowly strangled to death. The collars were tightened until eyes bulged and faces purpled, tightened still more until the windpipe was collapsed. The two men were then given the coup de grâce by the points of the tightening screws emerging cleverly from inside the backs of the collars to pierce the cervical vertebrae and crush the spinal cord.

Decapitation, once a popular form of capital punishment throughout the world, is now used sparingly despite an attempt by the Nazis to revive it during their brief but memorable rule of Schrecklichkeit. It was originally done by hand—with scimitar or cleaver in the East, with broadsword or ax in the West. Punitive head chopping was legally automated, however, as early as the 18th Century. The guillotine came into use in the early years of the French Revolution. Curiously, this lethal instrument, which became a symbol of the Reign of Terror, was originally suggested as a humane method of obviating the suffering attendant to executing the death penalty. Dr. Joseph Guillotin, a professor of anatomy appalled by the bloody extravagances of the French Revolution, carried on a campaign to humanize necessary killing, but resented the fact that his name was attached to the killing machine which he did not invent. Actually, the first "guillotine" was devised by Dr. Antoine

Louis, and was called, by contemporaries in his honor, a Louisette. It consisted—and still consists—of a trapezoidal knife weighing more than a hundred pounds, which drops ten feet between guide rails and slices on the bias through the neck of the condemned man who lies prone beneath it, his head immobilized by stock-like clamps. The severed head drops into a suitable container, while the body is rolled into a basket.

It was Dr. Guillotin's theory that this method of putting a man to death was the most compassionate, because the victim would feel nothing except perhaps a brief sensation of cold at the nape of his neck. Whether there is any intervening pain or the realization on the part of the severed head of its impossible position has never been confirmed or denied by any of the victims.

Executions by guillotine took place in a public square in Paris as late as 1939. The scaffolding and the weighted knife would be erected the night before, and although the accused died at dawn, there were always crowds on hand to be edified, if not deterred from crime, by the spectacle of the spurting carotid arteries, the ghastly surprised expression on the detached face, the reflex flopping of the headless body. Whether or not there was any appreciable deterrent effect, the grisly ritual is today privately performed behind the walls of La Santé prison on the Left Bank of the Seine.

Public hangings were abolished in England in 1868. At that time capital crimes numbered only a dozen, down from 200 in 1820. It is likely that the public spectacle was discontinued then because a royal commission had reported two years earlier that the death

penalty, even when witnessed by potential criminals, was no deterrent. The commission's report found that of the 167 persons executed in 1866, 164 had previously watched a hanging. This is not surprising, as the public executions used to attract huge crowds, and the crowds would attract dozens of pickpockets intent on plying the very trade for which the center of attraction was being hanged.

Public hangings persisted in America beyond the cutoff date in England, particularly in the Far West. The more spectacular forms of legal brutality were not practiced, however, even in the earlier Colonial days. There were, of course, occasional unofficial and nonintegrated autos-da-fé in some of the deeper parts of our Deep South, a practice that has carried over well into this century. But even the witches of Salem were not burned at the stake; they were decently hanged.

Crimes calling for the death penalty, however, were almost as numerous in Colonial America as in contemporary England. In 1636 hanging was the penalty in the Massachusetts Bay Colony for witchcraft, idolatry, blasphemy, assault in anger, murder, sodomy, buggery, statutory rape (the death penalty was optional for forcible rape), perjury in a capital case and rebellion. The Old Dominion of Virginia ranked the degree of criminality according to race, color and current condition of servitude. Seventy crimes were listed as capital for Negro slaves, but only five for whites.

It was inevitable that an emerging nation like the United States, aspiring to world leadership in science and invention and the practical application thereof, would sooner or later abandon hanging for a modern,

efficient, scientific and more "humane" method of legal murder. In 1880 the state of New York abolished the gallows in favor of a newfangled "electric chair." Thirteen years later a man named Kemmler lost his court battle to have the new monster declared unconstitutional as "cruel and unusual punishment," and became the first man to be punished electrically for his misdeed—an ax murder. The contraption was a success technically, since it killed Kemmler, but the humanity of the experiment was doubtful. Either the machine misfunctioned or the executioner did something wrong. There was considerable searing of flesh and the human guinea pig apparently died in agony.

Techniques have been improved in the 70-odd years since, and it is now generally agreed that death by electrocution is practically painless. While pathologists still argue over the exact mechanics of death by electricity—some believe the heart muscles are paralyzed; others are just as certain that paralysis of the respiratory centers causes death by asphyxia—most of them concede that the victim loses consciousness almost instantly. The tremendous electrical surge raises the temperature of the body to the boiling point and sears the brain to insensibility in a fraction of a second. The jerking and writhing that nauseate witnesses are not signs of a death struggle but purely reflex reactions of the muscles to an electrical impulse.

An expert hanging is also supposed to extinguish consciousness at the end of the drop. The snap of the rope grown taut theoretically breaks the neck and severs the spinal cord. The frantic kicking, the jerking arms, the ejaculation of sperm in men, are all unconscious nervous reflexes. Of course there have been many bungled hangings—defective traps, ropes that

broke, inexpert knots that merely choked the man to death. There is a record of an early English hanging of a half-starved female criminal who dropped through the trap and dangled at the end of the rope, eyes bulging with dread, because she was not heavy enough —she was a small 12-year-old girl—for the fall to break her neck. The hangman had to go down the 13 steps, grab her legs and add his weight to hers to carry out the sentence.

In 1921 the Nevada state legislature came up with the latest contribution to the fine art of killing criminals. It was not only scientific, quick and efficient; it introduced a new "humane" note: It would eliminate the torture of apprehension. Poison gas would be introduced without warning into the cell of the condemned man while he was asleep. He would die peacefully, and nobody's conscience need be disturbed by witnessing a death struggle. When a murderer named Gee Jon was sentenced to this new-style death three years later, it happily occurred to someone that the bars of Gee Jon's cell could hardly be expected to contain the lethal gas intended exclusively for Gee Jon's gentle extinction. Rather than risk exterminating the entire population of the penitentiary, instead, the penal authorities postponed the historic execution until a special gas chamber could be built.

Nine states besides Nevada now poison their capital criminals with gas. The best-known gas chamber of them all is California's, perhaps because Caryl Chessman died there after a legal fight that lasted 12 years. Chessman had a long record of charges against him, but the one for which he was finally executed was that of forcing a girl to move from one car to another at gunpoint. This is technically kidnaping in Cali-

fornia and is punishable by death under California's "Little Lindbergh Law."

Because there were many newsmen among the 60 witnesses who came to San Quentin for Chessman's execution, millions read descriptions of how a man dies by inhaling poison gas. It is a death not much different, they found, from hanging or electrocution. Looking through glass panels of the hermetically sealed gas chamber, the reporters saw the doomed Chessman enter and without hesitation sit down in the death chair, watch without expression while his arms and legs were strapped down. A clutch of cyanide "eggs," poised above a tub of acid beneath the chair, was released by remote control. As the fumes rose to shroud the prisoner, his eyes bulged, his head jerked, he gagged and gasped as he seemed to be struggling against the straps. In two minutes his long jaw sagged and his body slumped.

According to medical men, the gaseous cyanide derivatives are neurotoxins that attack the nerve centers and paralyze the cardiac and respiratory functions at the first deep whiff. The signs of a desperate death struggle, apparently the symptoms of great suffering, are again nothing more than unconscious reflexes.

So what is the meaning of all this scientific progress that we in America have made in the centuries and centuries since the boiling in oil, the crucifixions and the hanging of little children? We have perhaps reduced the coefficient of suffering to within a fraction of a second of the instantaneous extinction of the guillotine, which the late Albert Camus described as "a crude surgery [without] any edifying character whatever." We have reduced our lust for public blood-letting to boxing (which is becoming more and

more bloodless), auto racing and professional football. We no longer feed our wrongdoers to the crocodiles or invite VIPs to public hangings, as was the custom in Arizona, but we still kill our criminals in three quarters of our American states. We are far ahead of the rest of the world in the scientific technique of legal killing, but we are at least a century behind in the sociological, psychological, economic and humanitarian approach to the problem of crime and punishment.

Why do we still kill our killers? Do we imagine that we are doing justice, with no thought of vengeance? Do we think we are eradicating crime? Are we deluding ourselves that by snuffing out the lives of our misfits, our nitwits and our psychopathic personalities (who, our psychiatrists hasten to add, are not congenital psychopaths), are we creating a better world for ourselves? Do we really think that punishment will prevent crime, that killing murderers will prevent murder?

Where do we draw the line? It is certain that we would consider the Oriental methods of execution cruel. We would consider other methods that have since been tried cruel. Does death by a firing squad or gas or electricity become less cruel because these methods are used in the name of law and order in the free democracy of the United States of America? The actual act of execution is not only cruel in and of itself, but it is more than cruel if we are to contemplate the days and the nights of a man who is awaiting execution in the name of society by a soverign state. This usage of cruelty and cold-blooded premeditated murder is certainly a poor example of the humanity of a civilized people.

Is capital punishment unusual? In the year 1966, one person was executed by the 37 states still retaining the death penalty. In the year 1965, with 9,850 homocides committed, there were 7 executions. Year after year the number of men convicted of homocide and sentenced to life continues to increase in every state penitentiary where capital punishment is a part of the law. The number of persons executed even before the unofficial moratorium of 1967 has been gradually decreasing which makes the use of the death penalty more and more unusual. It is the person who commits the crime in an aroused community who is executed. It is the person without proper legal representation. It is the person without financial resources.

More and more the world has given recognition to the sacredness of life. Seventy-three countries have abolished the death penalty as well as 13 states of the United States. Yet, in no instance has there been an eruption of crime. For example, Michigan, which has not had capital punishment since 1947, over a period of years has had a lower rate of homocide than its adjoining states. The same is true with Maine, Rhode Island, Minnesota, Wisconsin, and North Dakota.

Often the death penalty is used as an excuse for not doing those things that should be done, such as improving corrections, developing a sounder approach to rehabilitation, and providing a more modern parole system. It seems almost unbelievable that in the year 1971 there should be continued reliance on the destruction of an occasional life with all its self-demeaning consequences. This is truly an instance where the Supreme Court of the United States speaking on behalf of the Constitution of the United States could restore justice to all.

CONCLUSION

For the reasons stated, the judgments of the Courts below should be reversed.

Respectfully submitted,

HON. EDMUND G. BROWN
HON. DAVID F. CARGO
HON. ELBERT N. CARVEL
HON. MICHAEL V. DISALLE
HON. PHILIP H. HOFF
HON. THEODORE R. MCKELDIN
HON. ENDICOTT PEABODY
HON. GRANT SAWYER
HON. MILTON J. SHAPP

By MICHAEL V. DISALLE
425 - 13th Street, N.W.
Washington, D. C. 20004
(202)-393-3300

Attorney for Amici Curiae

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IN THE

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No. 68-5027

EARNEST JAMES AIKENS, JR., *Petitioner,*

v.

CALIFORNIA, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 69-5003

WILLIAM HENRY FURMAN, *Petitioner,*

v.

GEORGIA, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 69-5030

LUCIUS JACKSON, JR., *Petitioner,*

v.

GEORGIA, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

MOTION OF STATE OF ALASKA FOR LEAVE TO FILE BRIEF AND BRIEF AS AMICUS CURIAE

JOHN E. HAVELOCK
Attorney General of Alaska
Pouch K, State Capitol
Juneau, Alaska 99801
Amicus Curiae

Washington, D. C. · THIEL PRESS · 202 · 393-0625

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MOTION OF STATE OF ALASKA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The State of Alaska by its Attorney General, John E. Havelock, respectfully moves this Court for leave to file the accompanying brief as *amicus curiae.*

The applicant has an interest in this case in that its citizens in their travels are subject to the laws of her sister states. Should a citizen of the applicant state commit a capital crime outside Alaska, the Eighth Amendment should not allow the death penalty to be applied.

Of greater concern: when it is not necessary to the protection of the public, official sanction of the excessive use of mortal violence anywhere in the United States is corruptive of individual attitudes concerning the sanctity of human life and encourages the casual use of violence. Since Alaska has no way to close her boundaries from this influence which pervades through media and migration, the peace of the State of Alaska is thereby endangered.

Further, the court may find an explanation of the Alaskan constitutional experience with "cruel and unusual punishment" of use in determining objective standards by which the Eighth Amendment is to be applied. Measured against this standard, the death penalty is excessive and "cruel and unusual."

The briefs of petitioners do not provide this insight.

Wherefore, applicant prays that attached brief *amicus curiae* be permitted to be filed with the Court.

Respectfully submitted,

STATE OF ALASKA

By: John E. Havelock
Attorney General
State of Alaska

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BRIEF OF STATE OF ALASKA AS AMICUS CURIAE

I

THE MINIMUM REQUIREMENTS OF THE EIGHTH AMENDMENT MEASURED BY AN "OBJECTIVE" TEST, THE NEEDS OF SOCIETY, RENDER THE DEATH PENALTY UNCONSTITUTIONAL AS "CRUEL AND UNUSUAL PUNISHMENT"

Petitioner argues that where it is practical to avoid the death penalty, it is morally and legally intolerable not to do so. By implication, petitioner asserts that an evaluation of the needs of present society provides an objective standard which should be applied in defining "cruel and unusual punishment". The State of Alaska concurs in this view.

In early American experience various forms of inhumane punishment were common. The reason that these same penalties are "cruel and unusual" today is that they are excessive in light of the needs and capabilities of contemporary society.

Social necessity as a constitutional standard has ample precedent. For example standards governing the exercise of free speech are formulated in terms of what society can tolerate.

In *Schenck v. U.S.*, 249 U.S. 47 (1919), dealing with the distribution of anti-war literature, Justice Holmes said:

> "The character of every act depends upon the circumstances in which it is done (p. 52).

Justice Brandeis, concurring in *Whitney v. California*, 274 U.S. 357 (1927) said:

> "To free men, no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion." (p. 377)

In other words, whether a speaker has gone beyond the protection of the first amendment is gauged by the social necessity of limiting the particular form of speech.

Courts have taken the same approach in other areas of constitutional law. In *Terry v. Ohio*, 392 U.S. 1 (1968), the court upheld a limited power in police to "stop and frisk" for weapons without a warrant and without the full measure of probable cause required for an arrest. This holding stems from the court's awareness of the importance of protecting the policeman as an agency of organized society.

The Alaska Constitution Makes Explicit the Basic Idea Contained in the Eighth Amendment

Section 12 of Article I of the Constitution of Alaska fol-
ws verbatim the language of the Eighth Amendment to
e Federal Constitution. In addition, however, the Alaska
ovision states:

> "Penal administration shall be based on the prin-
> ciple of reformation and upon the need for protect-
> ing the public."

his language is at the heart of Alaska's criminal law. It
ovides a definition of the goals of criminal law and a mea-
re of "cruel and unusual punishment".

Present American society, unlike eighteenth century soc-
y, has the ability to construct and staff penal institutions
hich make the death penalty unnecessary. Alaska, by rea-
n of its remoteness, great size, small population and cli-
tic conditions faces considerable difficulty in housing long
rm prisoners. Yet Alaska has abolished the death penalty
LA 1957, ch. 132).

lt is difficult to argue that those presently under sentence
death cannot be accommodated by our society. Life
ntences are served; rehabilitation does sometimes occur.
e man convicted of capital crime does not pose such a
eat to society that it can only respond effectively by
ing his life. Society can accomplish its goals with
pect to capital criminals by life imprisonment. Accord-
ly, the death penalty is excessive in relation to the needs
society and, we submit, a violation of the Eighth Amend-
nt.

II

EVEN UNDER THE MORE "SUBJECTIVE" TEST OF THE REQUIREMENTS OF THE EIGHTH AMENDMENT DERIVED FROM *ROBINSON v. CALIFORNIA, WEEMS v. U.S., AND TROP v. DULLES*, THE DEATH PENALTY IS "CRUEL AND UNUSUAL PUNISHMENT."

Trop v. Dulles, 356 U.S. 86 (1958), does not provide positive support for the constitutionality of the death penalty. It is true that Chief Justice Warren stated in dictum that because the death penalty was widely accepted it did not exceed the constitutional limits on punishment. However, as petitioner argues, the attitudes of society toward the death penalty have changed measurably since the *Trop* decision.

Moreover, the *Trop* case as a whole does not comport with the dictum paraphrased above. In *Trop*, the court faced the question of whether denationalization as punishment for wartime desertion was cruel and unusual. The dictum in question arose from the court's effort to rebut the argument that because the death penalty could have been imposed, denationalization could also. The court's grudging acknowledgement of the currency of the death penalty in 1958 is hardly an endorsement of the enduring constitutionality of that practice. See p. 99.

Trop, *Robinson*, and *Weems* provide a subjective test by which to apply the Eighth Amendment standard. The test, basically, is whether the penalty shocks the conscience of the court under the circumstances. Thus, the Court spoke in terms of "contemporary human knowledge", *Robinson v. California*, 370 U.S. 660, 666 (1962); "public opinion . . . enlighten by humane justice", *Weems v. United States*, 217 U.S. 349, 378 (1910); the "evolving standards of decency that mark the progress of maturing society", *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

Evidence marshalled in petitioner's argument indicates that the death penalty is unusual when its actual incidence

ed to the class of cases where it could be applied
r's brief, pp. 58-61) and that it has become even
rarity since the *Trop* decision. (*ibid.* pp. 36-38)

despread and growing opposition to the death pen-
elf evidence of public abhorrence of a penalty so
nd final. Accordingly, even under the more sub-
t used in the cited cases, the death penalty should

CONCLUSION

te of Alaska urges the Court to adopt the com-
objective standard made explicit by the additional
f the Alaska Constitution, but also inherent in
Amendment itself. The need for protecting the
gauge for the constitutionality of punishment
te the death penalty to a place in the past history
s development toward humanity.

Respectfully submitted,

STATE OF ALASKA

By: John E. Havelock
Attorney General

(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 68–5027

Earnest James Aikens, Jr., Petitioner, *v.* State of California. | On Writ of Certiorari to the Supreme Court of California.

[June 7, 1972]

PER CURIAM.

Petitioner in this case, which has been orally argued and is now *sub judice*, has filed a Suggestion of Mootness and Motion for Remand based on the intervening decision of the California Supreme Court in *People* v. *Anderson*, 6 Cal. 3d 628 (1972). That decision declared capital punishment in California unconstitutional under Art. 1, § 6, of the state constitution. The decision rested on an adequate state ground and the State's petition for writ of certiorari was denied. — U. S. —. The California Supreme Court declared in the *Anderson* case that its decision was fully retroactive and stated that any prisoner currently under sentence of death could petition a superior court to modify its judgment. Petitioner thus no longer faces a realistic threat of execution, and the issue on which certiorari was granted—the constitutionality of the death penalty under the Federal Constitution—is now moot in his case. Accordingly the writ of certiorari is dismissed.

END OF CASE